A legal review of the case of Dred Scott

A LEGAL REVIEW OF THE CASE OF DRED SCOTT, AS DECIDED BY THE SUPREME COURT OF THE UNITED STATES.

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N. B. The authors of this review have made some corrections and alterations in this edition.

THE CASE OF DRED SCOTT. *

* A report of the decision of the supreme court of the United States, and the opinions of the judges thereof, in the case of *Dred Scott* v. *John F. A. Sandford,* December Term, 1856. By Benjamin C. Howard, counsellor, at law and reporter of the decisions of the supreme court of the United States. New York: D. Appleton & Co. 1857. [Being pp. 393–633 of the 19th volume of Howard's Reports.]

A negro held in slavery in one State, under the laws thereof, and taken by his master, for a temporary residence, into a State where slavery is prohibited by law, and thence into a Territory acquired by treaty, where slavery is prohibited by act of congress, and afterwards returning with his master into the same slave State, and resuming his residence there, is

not such a citizen of that State as may sue there in the circuit court of the United States, if by the law of that State, as repeatedly declared by its highest court in recent decisions, a negro under such circumstances is a slave; although by the law of that State at the time of his return, as settled by earlier cases, he was then a freeman; and although the new decisions be not based upon the construction of the Constitution and statutes of the State, but upon the ground that the State will not enforce laws which prohibit slavery in other States or Territories. [McLean and Curtis, JJ. dissenting.]

The arguments in the case of Dred Scott, before the supreme court of the United States, and the opinions of the judges, touched upon questions of such importance, and have excited so general an interest, and awakened so much criticism, and the decision has been so often misunderstood, that the case demands a more extended notice than we usually give to adjudged cases. Of the political causes and consequences of the judgment, we have nothing to say. We propose to discuss it in its legal aspects only, and for that reason, as well as to enable the reader to carry with him the point decided, we have placed at the head of this article an abstract or marginal note, such as we should insert if we were making a report of the case.

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We have abstained from noticing the case till now, because we had no official report, excepting of the opinions of two of the judges. Some fault has been found with those members of the court for allowing their opinions to be printed separately. But since it is the almost uniform custom of the judges of this court to file their opinions, when delivered, with the clerk, who at once sends copies to the parties; and since there is no copyright in these opinions, as was decided in a controversy between two former reporters of the court, (*Wheaton* v. *Peters,* 8 Peters, 591;) there is no reason why they should not be published immediately.

Severe comments have also been made on the holding back of the opinions of the other judges, and on the apparent alterations made in some of them since they were

pronounced. But the profession and the public are concerned to have the matured and deliberate, rather than the earliest expression of these opinions; and where the judgment itself is not affected, the parties have no ground of complaint. The individual judges alone can be injured, who, if in the majority, may find that their associates rely upon reasons and illustrations which they consider untenable, or, if in the minority, may see new arguments introduced to fortify positions to which, as originally taken, they had already replied. For an example of the ill effects of such alterations we may refer to the *Passenger Cases,* 7 Howard, 403, 430, where some of the judges repudiated parts of an opinion of the court, as delivered by one of their number, charged with that duty, in a former case on the same subject, and in which opinion they appeared, by the official report, to have concurred. And the danger of injustice to the minority is clearly shown by the following extract from Mr. Justice Daniel's note to his opinion in those cases.

“In the opinions placed on file by some of the justices constituting the majority in the decision of this case, there appearing to be positions and arguments which are not recollected as having been propounded from the bench, and which are regarded as scarcely reconcilable with the former then examined and replied to by the minority, it becomes an act of justice to the minority that these positions and arguments, now for the first time encountered, should not pass without comment. Such comment is called for, in order to vindicate the dissenting justices, first, from the folly of combating reasonings and positions which do not appear upon the record; and, secondly, from the delinquency of seeming to recoil from exigencies, with which, however 5 they may be supposed to have existed, the dissenting justices never were in fact confronted. It is called for by this further and obvious consideration, that, should the modification or retraction of opinions delivered in court obtain in practice, it would result in this palpable irregularity; namely, that opinions, which, as those of the court, should have been premeditated and solemnly pronounced from the bench antecedently to the opinions of the minority, may in reality be nothing more than criticisms on opinions delivered subsequently in the order of business to those of the majority, or they may be mere afterthoughts, changing entirely the true aspect of causes

as they stood in the court, and presenting through the published reports what would not be a true history of the causes decided." 7 Howard, 515, 516.

We proceed to a statement of the present case. It was an action of trespass brought in the circuit court of the United States for the district of Missouri, to try Dred Scott's title to his freedom. The plaintiff was described in the writ as a citizen of Missouri, and the defendant as a citizen of New York. The declaration contained three counts, alleging assaults on the plaintiff, on Harriet Scott his wife, and on Eliza and Lizzie his children.

The defendant filed a plea to the jurisdiction, that the plaintiff was not a citizen of Missouri, "because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves." To this plea there was a general demurrer, which was sustained by the court. The defendant then, by leave of court and with the plaintiff's consent, pleaded three pleas in bar, to the effect that the plaintiff and his wife and children were negro slaves, the property of the defendant. At the trial before the jury, the only evidence introduced was a statement of facts, signed by the parties, in substance as follows:

In 1834 the plaintiff was a negro slave belonging to Dr Emerson, who was a surgeon in the army of the United States, and who in that year took the plaintiff from Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until April or May, 1836, when he removed to the military post at Fort Shelling, on the west bank of the Mississippi River, in the territory formerly known as Upper Louisiana, acquired by the United States from France, and situated north of the line of 36° 30# north latitude, and north of the State of Missouri, 1* 6 (and since called Wisconsin, and now Minnesota Territory,) where he continued to hold the plaintiff as a slave until 1838. In 1835 Harriet was the slave of Major Taliaferro, of the army of the United States, who in that year look her to Fort Snelling, and there held her as a slave until 1836, when he sold her to Dr. Emerson, who continued to hold her there as a slave until 1838. In 1836 the plaintiff and Harriet intermarried at Fort Snelling, with the consent of Dr. Emerson, who then claimed

to be the owner of both; and Eliza and Lizzie are the fruit of the marriage. Eliza is about fourteen years old, and was born on board a steamboat on the Mississippi River, north of the line of 36° 30# north latitude; Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks. In 1838 Dr. Emerson removed, with the plaintiff and his said wife and oldest child, to the State of Missouri, where they have ever since resided. The defendant is Dr. Emerson's administrator. The plaintiff had previously brought a suit for his freedom in the circuit court of St. Louis County, Missouri, and obtained a verdict and judgment; but on a writ of error, the supreme court of that State reversed the judgment, and remitted the case to the inferior court, where it was continued to await the decision of this suit.

Upon these facts, the jury, by direction of the court, returned a verdict for the defendant, and the plaintiff alleged exceptions, and brought up the case by writ of error.

The principal points which have been suggested as having arisen in this case, and having been decided by the court, are the following:

1st. That a free negro cannot be a citizen of the United States.

2d. That so much of the Missouri Compromise Act, as prohibited slavery in the Territory of the United States north of 36° 30#, is unconstitutional.

3d. That a person held in slavery in one State may be taken by his master to a State where slavery is prohibited by law, and yet not be entitled to claim his freedom there.

4th. That a slave taken by his master into a free State, if he omits to claim his freedom there, and returns to a slave State, becomes a slave again.

In order to ascertain what the court did judicially determine, we shall be obliged to make a somewhat careful examination and comparison of the opinions of the judges. We also propose to consider the soundness of the positions advanced in these opinions. But

first, as a guide in 7 this investigation, we would refer to the well settled rule of law, that an adjudged case is entitled to weight as authority upon those points only which were necessary to its decision. Chief Justice Marshall (and we could cite no greater name) said: “It, is a general rule, expressly recognized by the court in *Sturges* v. *Crowninshield,* that the positive authority of a decision is co-extensive only with the facts on which it is made.” *Ogden* v. *Saunders,* 12 Wheaton, 333. To the same effect is the language of Chancellor Kent: “The expressions of every judge must be taken with reference to the case on which he decided; we must look to the principle of the decision, and not to the manner in which the case is argued upon the bench, otherwise the law will be thrown into extreme confusion.” 1 Kent Com. 478. And Mr. Justice Curtis, in 1853, when delivering the unanimous opinion of the supreme court of the United States, then consisting of all the judges now upon the bench, in a case in which it was necessary to dispose of a decision of the court of appeals of Maryland, which was relied on as a binding precedent, said, that to make an opinion, on any question, a decision, “there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties, and decide to whom the property in contestation belongs. And therefore this court has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties.” *Carroll* v. *Carroll,* 16 Howard, 287.

That part of the report to which we naturally first look for the point adjudged, is the head note prepared by the reporter; but Mr. Howard's abstract in this case, with its five divisions and thirty-one subdivisions, is so widely different from any form of such a note ever seen before, and contains so many positions not determined by the court, nor even affirmed by a majority of the judges, that, although it is a good synopsis of the opinion of the Chief Justice, we can derive but little aid from it in our inquiry. It is somewhat curious to compare it with the head note, by the same reporter, of a former case reported at equal length, which also excited great public interest and discussion, and in which, as in this, each of the nine judges delivered a separate opinion. We refer to the *Passenger Cases,* 7 Howard,

283. That head note contained only two paragraphs, and was apparently intended to shaw that the court, “as a court,” did not decide anything; this seems to be framed to show 8 that the court, this time, undertook to decide at least every'thing within its reach.

The head note to the *Passenger Cases,* which we copy here for convenience of comparison, is as follows:

“Statutes of the States of New York and Massachusetts, imposing taxes upon alien passengers arriving in ports of those States, declared to be contrary to the Constitution and laws of the United States, and therefore null and void.”

“Inasmuch as there was no opinion of the court, as a court, the reporter refers the reader to the opinions of the judges for an explanation of the statutes and the points in which they conflicted with the Constitution and laws of the United States.”

In this case of Dred Scott, the opinion of the Chief Justice is called by himself, and by the reporter, the opinion of the court. Let us consider, for a moment, its title to this distinction. When one judge, of a bench consisting of several, delivers an opinion as the opinion of the court, it is undoubtedly to be deemed the opinion of every judge, who does not express his own; but the judges who openly dissent from it are of course in no wise responsible for it; nor are those, who announce that they concur in parts of it only, to be considered as assenting to the remainder. In this case, Mr. Justice Wayne is the only judge who “concurs entirely in the opinion of the court, as it has been written and read by the Chief Justice, without any qualification of its reasoning or its conclusions.” Mr. Justice Nelson commences by saying, “I shall proceed to state the grounds upon which I have arrived at the conclusion that the judgment of the court below should be affirmed,” and agrees with very few of the Chief Justice's positions. Mr. Justice Crier “concurs in the opinion delivered by Mr. Justice Nelson on the questions discussed by him,” and “also concurs with the opinion of the court as delivered by the Chief Justice,” upon two points only. Mr. Justice Daniel, though agreeing substantially with the Chief Justice, himself

discusses all the questions in the case, and concludes as follows: “In conclusion, my opinion is that the decision of the circuit court,” &c. Mr. Justice Campbell begins thus: “I concur in the judgment pronounced by the Chief Justice, but the importance of the cause, the expectation and interest it has awakened, and the responsibility involved in its determination, induce me to file a separate opinion,” in which he limits in some respects his concurrence. Mr. Justice Carton concurs in the opinion of Mr. Justice Nelson, and concurs in only one other point with the Chief Justice, 9 and, “for the reasons above stated, concurs with his brother judges” in the judgment. Mr. Justice McLean and Mr. Justice Curtis wholly dissent. It thus appears that the Chief Justice speaks only for himself and Mr. Justice Wayne, and that each of the other judges defines his own position.

We feel bound to say that the opinion of the Chief Justice is by no means the ablest or soundest of the opinions in this case. It bears marks of great labor, and of an anxiety to meet, and, as far as possible, to reply, to, all objections which might be raised to its conclusions. But in its tone and manner of reasoning, as well as in the positions which it assumes, it is unworthy of the reputation of that great magistrate, who for twenty years has maintained the position of the intellectual, as well as the nominal head of the highest tribunal of the country, and to whose grasp of mind, logical power, keen discrimination, and judicial wisdom, the people have been accustomed to look, with a confidence rarely disappointed, in cases involving great principles of the Constitution of the United States, of the law of nations, and of conflicts between different systems of jurisprudence. For instances of his masterly treatment of such questions, we need only refer to his opinion in the case of *Charles River Bridge* v. *Warren Bridge,* 11 Peters, 536, which has been universally followed and assented to as a correct statement of the law of franchises; and to that in the case of the *Rhode Island Rebellion,* 7 Howard, 1, in which the extent to which the courts of the United States must be guided by the decisions of the State courts, and the acts of the executive department of the United States, in determining what is the true Constitution of a State, is defined even more clearly than was done by Mr. Webster in his celebrated argument in that case.

It must be a subject of deep regret to all who know how often Mr. Justice Wayne has been found on the side of true conservatism and sound law, when, in the unhappy divisions of the court, the old landmarks were in some danger, and who particularly remember the opinion delivered by him only three years ago on the power of congress to regulate the Territories, (which we shall hereafter cite,) to find him now one of the only two judges who can bring themselves fully to support the opinion of their chief, the other being Mr. Justice Daniel, a judge notorious for his eccentricities of constitutional interpretation, but who does not usually err against the rights of the States and their citizens. Perhaps, however, we are unable to appreciate 10 arguments founded on such positions as the following: “The only private property which the Constitution has *specifically recognized,* and has imposed it as a direct obligation both on the States and the federal government to protect and *enforce,* is the property of the master in his slave; no other right of property is placed by the Constitution upon the same high ground, nor shielded by a similar guaranty.” p. 490. The italics are Mr. Justice Daniel's.

I. The first question, on which the court is supposed to have expressed an opinion, is whether a negro can be a citizen of the United States.

The plea to the jurisdiction presented this point in the circuit court in the following modified form, namely, Whether a person of pure African blood, whose ancestors were imported into this country as slaves, could be a citizen of Missouri, authorized to sue in the circuit court of the United States under those provisions of the Constitution and laws, which give that court jurisdiction of all controversies between citizens of different States.

There were great differences of opinion and of reasoning among the judges upon the question whether the point raised by the plea to the jurisdiction was open upon this writ of error, after the defendant had pleaded to the merits and obtained judgment in his favor in the court below. We are inclined to think that it was not open in the supreme court, for the following reasons: It has been well settled for more than half a century, that the supreme court of the United States has no jurisdiction except where it has been expressly

conferred by congress, and that, as the twenty-second section of the judiciary act of 1789 permits writs of error to a circuit court of the United States only upon “final judgments and decrees in civil actions,” no writ of error lies upon a mere interlocutory judgment, such as one that the defendant answer over. *Rutherford* v. *Fisher,* 4 Dallas, 22. A writ of error upon a final judgment would, of course, bring before the higher court not only that judgment, but also every previous order or ruling against the plaintiff in error, which was a necessary step for the court to take in arriving at that judgment, and which appears on the record. A final judgment is a judgment which finally disposes of the suit in the court which renders it. Thus, in this case, if the plaintiff's demurrer had been overruled, and the plea to the jurisdiction sustained, the judgment dismissing the suit would have been a final judgment, and the plaintiff might have sued out his 11 writ of error at once. If, on the other hand, not only this interlocutory judgment, but also the judgment on the merits, had been against the defendant, he might, on a writ of error sued out by him, have relied upon errors in either judgment against him, for the first would have been a necessary step to arriving at the second. But in this case, as actually presented to the supreme court on the plaintiff's writ of error, the only judgment against the plaintiff was the final judgment, and he could not object to the interlocutory judgment in his own favor; nor could the defendant object to that judgment, because he had finally prevailed. And if the court should be of opinion that the final judgment for the defendant was erroneous, and should therefore order the case to a new trial, and that trial should result in a judgment against the defendant, he might, by a writ of error sued out to reverse that judgment, bring before the court the original judgment of *respondeat ouster,* without which no final judgment against him could have been arrived at; and in that way prevent the court from rendering judgment in a case of which it had no jurisdiction, if such were the fact. This question is a purely technical one, and the more we have examined it, the more difficult have we found it to arrive at a satisfactory conclusion. We feel great doubts of the correctness of the view here suggested, especially as it does not entirely coincide with that of any of the judges; but it would be a waste of time to discuss it at greater length, for to prove that the question was open in the supreme court, would only be to show that it might have been decided.

It is much easier to show that it was not in fact decided. Upon this point there seems to have been some misapprehension among the judges themselves. The Chief Justice says, on page 427, that “the court is of opinion that the judgment on the plea in abatement is erroneous;” and Justices Wayne and Daniel, as well as Justices McLean and Curtis, evidently suppose this point to be decided, pp. 456, 492, 549, 590. But whatever may have been the aspect of the case when the opinions were delivered in court, and when those of the minority were printed, it now appears by Mr. Howard's report of the opinions as finally drawn up, some of which were never delivered from the bench, that a majority of the judges did not treat the question as before them for adjudication—Justices Catron and McLean being of opinion that it was not open, (pp. 518, 530;) and Justices Nelson, Grier, and Campbell, that it was not necessary to the decision of the cause, and refusing to give any opinion 12 upon it, (pp. 458, 469, 493, 518.) Only the Chief Justice and Justices Wayne, Daniel, and Curtis, considered the point; but the last did not deem it a good answer to the plaintiff's suit. It is clear, therefore, that only four judges out of nine considered it as a question to be decided; and that only two of his associates agreed with the Chief Justice in his conclusion that a negro, under the circumstances stated in this plea, could not maintain an action in the courts of the United States. It may be added that Mr. Justice McLean declares that, if the question is to be deemed open, in his opinion a negro may be a citizen within the meaning of the Constitution. p. 531.

This being the case, we do not see how the court could remit the cause to the circuit court with instructions to dismiss it for want of jurisdiction; for we had supposed it to be the settled law of the supreme court, that the citizenship of the parties, if duly averred in the writ, could not be tried except on a plea to the jurisdiction. *Livingston* v. *Story,* 11 Peters, 393; *Sheppard* v. *Graves,* 14 Howard, 510. But the judgment of the court, as stated by the Chief Justice at the conclusion of his opinion, which undoubtedly corresponds with the mandate sent to the circuit court, and in which a majority of the judges must have concurred, is, “that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the

circuit court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must consequently be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction." The only ground on which this judgment could have been arrived at is, that the question of jurisdiction is open at any stage of a cause in the courts of the United States, if appearing on the record; and that position is distinctly asserted by the Chief Justice on pages 427, 429, 430. The conclusion of the majority of the court therefore was, that, upon all the facts in the case, the plaintiff was a slave, and therefore not capable of suing as a citizen. How far those facts limit the point adjudged, we shall consider hereafter.

But as the general question of the citizenship of free negroes is of great interest and importance, and was discussed at length by some of the judges, it is worthy of a careful examination. The Chief Justice well states the question thus: "The words 'people of the United States' and 'citizens,' are synonymous terms, and mean the same 13 thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty?" p. 404.

This question is discussed principally in the opinions of the Chief Justice and Mr. Justice Curtis, and in order to understand it correctly, we must give an outline of their views. Both start with the admission, that, before the adoption of the federal Constitution, the power of naturalization was in the several States; and both assert, what is universally admitted, that the grant to congress of power to establish a uniform rule of naturalization, throughout the United States, applies only to aliens, that is, persons born out of the allegiance of the United States or of any State; and necessarily takes away from the States the right to

make such persons citizens of the United States in the sense of the Constitution. But here their lines of argument diverge.

The Chief Justice is of opinion that a State may still confer the character and all the rights of a citizen “upon an alien, or any one it thinks proper, or upon any class or description of persons”; but that, as a State has no power of legislation beyond its own limits, such rights must be restricted to the State which gives them, and can confer no corresponding rights as a citizen of the United States; and that, as congress cannot confer these privileges except upon aliens, no class of persons, not aliens, can in any way be admitted to the rights of citizens of the United States, who were not citizens when the Constitution was adopted; that negroes at that time formed no part of the “people” of the several States, but were an inferior class of beings, possessing no rights entitled to protection.

Mr. Justice Curtis maintains, on the other hand, that the States have now no power to naturalize aliens, even to the limited extent of making them citizens of the State—the grant to congress comprehending the whole subject; but that the States retain full power to confer citizenship on any persons born on their soil, to the full extent of making them citizens of the United States; though he denies their 2 14 power to confer those rights on persons born in other States of the Union, who are not recognized as citizens in their native State. He then shows that, in several States, negroes, as part of the people, joined in the adoption of the federal Constitution, and have both before and since been recognized as citizens, and therefore contends that, in those States in which no law to the contrary is proved, they are to be deemed citizens, and may sue as such in the courts of the United States.

Let us test the soundness of these several positions. Citizenship, as we understand it, may be acquired in either of two ways—by birth; or by adoption, called, when applied to aliens, naturalization. After the Declaration of Independence, and before the adoption of the Constitution of the United States, the power of conferring citizenship, by naturalization or otherwise, like all other sovereign powers, was in the several States. And as the

power vested in congress by that instrument applies to aliens only; and as all powers not delegated to congress by the Constitution, nor prohibited to the States, are expressly reserved to the States respectively, or to the people; the power of conferring citizenship, on all persons not aliens, necessarily remains in the several States, both as to persons born on their soil, and as to those born in other parts of the Union; and any person upon whom such rights are conferred becomes a citizen of the State conferring them.

And every citizen of a State is, *ipso facto,* a citizen of the United States. 2 Story on the Constitution, (2d ed.) § 1693. The preamble of the Constitution of the United States declares that it is established “by the people of the United States,” that is, by the people of the States already confederated and known by that name. All admit that those who were citizens of the several States at that time became citizens of the United States; and no sound reason has been suggested why their successors should not acquire the same rights in the same way. The Constitution usually treats of citizens as belonging to the several States; for instance, in the clause concerning the judicial power of the United States, under which the question arose in this case; and in the provision that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. It refers exclusively to State laws to ascertain the qualifications of voters for officers of the United States; thus representatives in congress are to be chosen by those persons qualified to choose members of the most numerous branch of the State legislature, and presidential 15 electors in such manner as the State legislatures may appoint. The only instances, in which the Constitution speaks of “a citizen of the United States,” are in fixing the qualifications of federal officers—representatives, senators, and president—where that expression is peculiarly appropriate.

With regard to the right of the States, since the adoption of the federal Constitution, to confer citizenship, we have a single remark to make upon the position of each of the two learned judges. The effect of the Chief Justice's doctrine that the States may make citizens who shall not be citizens of the United States, is, that members of congress, and even the president of the United States, may be chosen by persons not citizens of the United

States. If, on the other hand, the power of the States be limited, as Mr. Justice Curtis suggests, to persons either born on their soil or citizens of other States, then no one, white or black, not recognized as a citizen in his native State, can ever become a citizen of any other State or of the United States; and this conclusion can hardly be correct without the additional limitation, that even a citizen of one State, who changes his permanent residence to another, loses all rights of citizenship; for the right of the State into which he comes to adopt him as a member, must depend upon the extent of its own power, and not upon his condition while subject to another sovereignty.

The position, that free negroes may sue in the courts of the United States, would seem to be sufficiently established by showing that they are now citizens of some of the States; and that they are so is admitted by the Chief Justice himself. But, for the purposes of this discussion, we are willing to rest their rights, in this respect, upon the proposition that they were a part of the people of the United States when the Constitution was adopted; and if they were admitted to be such in any part of the country at that time, the argument of the Chief Justice is fully answered. That they were so is as clear as any fact of history.

The State of Massachusetts, being one of the oldest, and at that time one of the most populous and important of the original thirteen, is chosen as an example by the Chief Justice. The Constitution of Massachusetts was formed during the Revolutionary War, and several years before that of the United States. It contains numerous passages which clearly show that it is intended for all inhabitants without exception—for all who were subjects of Great Britain. It uses the words “people,” “citizens,” 16 “subjects,” and “inhabitants,” as entirely synonymous and convertible terms. This is sufficiently shown by the following articles of the Declaration of Rights, prefixed to that Constitution: “ *All men* are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; and that of acquiring, possessing, and protecting property.” “No *subject* shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience.” “Government is

instituted for the common good; for the protection, safety, prosperity, and happiness of the *people;* and not for the profit, honor, or private interest of any one man, family, or class of men." "All the *inhabitants* of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected for public employments." "Every *subject* of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character." "In criminal prosecutions, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the *citizen.* " And it may be truly said of each of these clauses, as was said by Chief Justice Shaw of that first cited: "That the description was broad enough in its terms to embrace negroes, and that it was intended by the framers of the Constitution to embrace them, is proved by the earliest contemporaneous construction, by an unbroken series of judicial decisions, and by a uniform practice from the adoption of the Constitution to the present time. The whole tenor of our policy, of our legislation and jurisprudence, from that time to the present, has been consistent with this construction, and with no other." *Commonwealth* v. *Aves,* 18 Pick. 210.

To meet these well authenticated facts, the only evidence which Chief Justice Taney produces to prove "the degraded condition of this unhappy race" in Massachusetts, and in support of his theory that they were no part of the people of that State, is the statute prohibition, which existed for more than a hundred years, of marriage between them and white persons—a prohibition founded on purely physiological grounds, and which no more shows the degraded condition of one race than of the other. A similar prohibition, and for similar reasons, applied and still applies to 17 grandmothers and aunts; yet these respected relatives are not without the pale of the Constitution. Well may Mr. Justice Curtis remark, as he does on page 574, "An argument from speculative premises, however well chosen, that the then state of opinion in the Commonwealth of Massachusetts was not consistent with the natural rights of people of color who were born on that soil, and that they were not by the Constitution of 1780 of that State admitted to the condition of citizens,

would be received with surprise by the people of that State, who know their own political history."

When Chief Justice Taney, on page 415, in commenting on laws of New Hampshire, enacted in the present century, by which no one was permitted to be enrolled in the militia of the State but free white citizens, said that "nothing could more strongly mark the entire repudiation of the African race," he must for a moment have forgotten the paramount power over this subject given to congress by the Constitution, and the act of congress of 1792, (which he cites five pages later,) providing for the enrolment of only "every free ablebodied white male citizen." When he does cite that act, it is to argue from its terms that negroes were not accounted citizens by the congress of that day. To this position Mr. Justice Curtis's answer is complete: "An assumption that none but white persons are citizens would be as inconsistent with the just import of this language as that all citizens are ablebodied or males." And Mr. Justice Curtis further shows, on page 574, that free negroes were considered citizens in New Hampshire, and also in New Jersey, at the time of the adoption of the Constitution of the United States.

For a clear statement of the law of New York, as well as of the general doctrine on this subject, we cannot do better than quote from Chancellor Kent, "whose accuracy and research no one will question," as Chief Justice Taney well remarks, on page 416, in speaking of the very note from which the following passage is taken: "It is certain that the Constitution and statute law of New York, (Const. art. 2; N. Y. Revised Statutes, vol. i. p. 126, sec. 2,) speak of men of color as being *citizens,* and capable of being freeholders, and entitled to vote. And if, at common law, all human beings born within the ligeance of the king, and under the king's obedience, were natural born subjects, and not aliens, I do not perceive why this doctrine does not apply to these United States, in all cases in 2* 18 which there is no express constitutional or statute declaration to the contrary. Blacks, whether born free or in bondage, if born under the jurisdiction and allegiance of the United States, are natives, and not aliens. They are what the common law terms natural born subjects. Subject and citizen are, in a degree, convertible terms, as applied to natives;

and though the term *citizen* seems to be appropriate to republican freemen, yet we are, equally with the inhabitants of all other countries, *subjects,* for we are equally bound, by allegiance and subjection, to the government and law of the land. The privilege of voting, and the legal capacity for office, are not essential to the character of a citizen, for women are citizens without either; and free people of color may enjoy the one, and may acquire, and hold, and devise, and transmit, by hereditary descent, real and personal estates. The better opinion, I should think, was, that negroes or other slaves, born within and under the allegiance of the United States, are natural born subjects, but not citizens. *Citizens,* under our constitutions and laws, mean free inhabitants, born within the United States, or naturalized under the law of congress. If a slave born in the United States be manumitted, or otherwise lawfully discharged from bondage, or if a black man be born within the United States, and born free, he becomes thenceforward a citizen, but under such disabilities as the laws of the States respectively may deem it expedient to prescribe to free persons of color." 2 Kent Com. (6th ed.) 258, note *b.*

To the same effect is the opinion of the supreme court of North Carolina, as delivered by Mr. Justice Gaston, which we cite at some length, both for its great intrinsic merit, and to show that these views are not confined to any one section of the country: "According to the laws of this State, all human beings within it, who are not slaves, fall within one of two classes. Whatever distinctions may have existed in the Roman law between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution, all persons born within the dominions of the king of Great Britain, whatever their color or complexion, were native-born British subjects; those born out of his allegiance were aliens. Slavery did not exist in England, but it did exist in the British colonies. Slaves were not, in legal parlance, persons, but property. The moment the incapacity or disqualification of slavery was removed, they became persons, and were then either British subjects or not British subjects, accordingly as they were or were not 19 born within the allegiance of the British king. Upon the Revolution, no other change took place in the law of North Carolina than was consequent upon the transition from a colony dependent upon a European king to

a free and sovereign State; slaves remained slaves; British subjects in North Carolina became North Carolina freemen; foreigners, until made members of the State, continued aliens; slaves manumitted here became freemen, and therefore, if born within North Carolina, are citizens of North Carolina; and all free persons, born within the State, are born citizens of the State." "It has been said that by the Constitution of the United States, the power of naturalization has been conferred exclusively upon congress, and therefore it cannot be competent for any State, by its municipal regulations, to make a citizen. But what is naturalization? It is the removal of the disabilities of alienage. Emancipation is the removal of the incapacity of slavery. The latter depends wholly upon the internal regulations of the State; the former belongs to the government of the United States. It would be a dangerous mistake to confound them." *State* v. *Manuel,* 4 Dev. & Bat. 24, 25. And this was again recognized as the settled law of that State, in *State* v. *Newsom,* 5 Iredell, 253.

It is not strange that Mr. Justice Catron abstained from concurring in the opinion of Chief Justice Taney upon this point; for he must have remembered these decisions of his native State, as well as his own opinion when presiding over the supreme court of Tennessee, in which he said: "The idea that a will emancipating slaves, or deed of manumission, is void in this State, is ill founded. It is binding on the representatives of the devisor in the one case, and the grantor in the other, and communicates a right to the slave; but it is an imperfect right, until the State, the community of which such emancipated person is to become a member, assents to the contract between the master and slave. It is adopting into the body politic a new member—a vastly important measure in every community, and especially in ours, where the majority of freemen over twenty-one years of age govern the balance of the people, together with themselves; where the free negro's vote at the polls is of as high value as that of any man." "It is an act of sovereignty, just as much as naturalizing the foreign subject. The highest act of sovereignty a government can perform, is to adopt a new member with all the privileges and duties of citizenship." *Fisher's Negroes* v. *Dabbs,* 6 Yerger, 126, 127.

We have thus shown that in many of the States, at and since the time of the adoption of the federal Constitution, free negroes have not only been recognized as citizens, but allowed to exercise one of the highest privileges of citizenship, that of voting. But this privilege is by no means necessary to citizenship, as is now generally conceded, and is well stated by the Chief Justice, on page 422: “Undoubtedly a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share in the political power, and is incapacitated from holding particular offices. Women and minors who form part of the political family cannot vote; and where a property qualification is required to vote, or hold a particular office, those who have not the necessary qualification cannot vote, or hold the office; yet they are citizens.” As most, if not all, of those decisions which deny the title of citizen to free negroes, are founded upon the assumption that the right to vote is necessary to citizenship; and as those decisions prove, at most, only that negroes cannot be citizens in the States whose courts deny them that character; we do not consider it necessary more particularly to examine them.

No candid man can read the acts of congress without being convinced that the laws of the United States acknowledge no qualification of color or race, as essential to the citizenship of native-born inhabitants. The very unanimity of opinion on this point accounts for the fact that citizenship is nowhere defined. Instances are not wanting, however, in which the fact that negroes may be citizens is expressed with a distinctness that cannot be misunderstood. Thus the act of congress of February 28, 1803, imposed a penalty on any one who should import, into any State which had prohibited or should prohibit the slave trade, “any negro, mulatto, or other person of color, not being a native, a citizen, or a registered seaman of the United States,” &c.; and as the act of 1796 did not authorize any but citizens of the United States to be registered as seamen, the act of 1803 twice recognizes negroes as citizens. This act bears the signature of Thomas Jefferson, the writer of the Declaration of Independence, and is of itself a sufficient answer to the assertion of the Chief Justice, that “the legislation and histories of the times, and the

language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, 21 nor intended to be included in the general words used in that memorable instrument." p. 407.

Free negroes have also been admitted as citizens by every treaty, by which the United States have acquired a Territory from a foreign nation. Thus the treaty with France of 1803, by which that Territory was obtained, part of which now forms the State of Missouri, provides that "the *inhabitants* of the ceded Territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States." The treaty with Spain for the purchase of Florida, contains the like words, under which the supreme court of Alabama have held that a free negro was entitled to the rights of a citizen of the United States. *Tannis* v. *Doe,* 21 Alab. 454. Perhaps the silence of Mr. Justice Campbell on this point may have been occasioned in part by the decision of the supreme court of his own State. The treaty with Mexico of 1848, contained a similar clause, using the words "citizens" instead of "inhabitants;" and the supreme court of the United States, within two years past, unanimously declared, in a case where the title of land depended upon the point, that "all the inhabitants, without distinction, whether Europeans, Africans, or Indians, were citizens" of Mexico. *United States* v. *Ritchie,* 17 Howard, 525.

The authorities therefore clearly show that free negroes, born in the United States, are to be presumed citizens in all those States in which no law to the contrary is proved. No statute or decision of the State of Missouri, as to the extent of the rights allowed to free negroes in that State, is referred to in the opinion of any of the judges. We have had no opportunity to make a thorough examination of the statutes of Missouri, but some of them in so many terms recognize the fact that there may be free negroes who are citizens of the United States. Revised Statutes of Missouri, c. 123, § 9.

The three judges, who now think that free negroes cannot be citizens, seem to have been much influenced by the consideration, that, if citizens, they might, under the clause giving to citizens of each State all privileges and immunities of citizens in the several States, claim rights which might be dangerous to the peace and safety of States where slavery is recognized. We are inclined to think that clause secures to citizens of one State in another, those privileges and immunities only which would there be allowed to citizens 22 of the same class or description under like circumstances. But precisely what rights are guarantied by this clause, or how it is to be enforced, has never been judicially determined, nor has its practical construction been uniform; it is therefore a very unsafe guide in interpreting the much clearer clause of the Constitution, under which this question arose, the evident intention of which is to require of a suitor no qualification but residence in a different State or country from the party sued.

The object of this provision, as declared by the supreme court, was, “to have a tribunal in each State, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress.” *Gordon* v. *Longest,* 16 Peters, 104. But if the novel doctrine under consideration be true, a person of color, kidnapped or unlawfully imprisoned at the South, would be without redress, except in the State courts; as on the other hand, the only remedy of a citizen of a Southern State against a colored person at the North, for a debt or personal injury, would be in the courts of a Northern State. And thus this wise provision of the Constitution would fail to reach those very cases in which an impartial administration of justice would most require its application.

But the Chief Justice's construction of the Constitution, if taken to be as he repeatedly states it, is not limited in its consequences to the rights of individuals, but seriously affects the political power of the States. For, after speaking of two clauses in the Constitution, which “point directly and specifically to the negro race as a separate class of persons,” and then of the Constitution as reserving to the States the right to import slaves until 1808, and as pledging the States to deliver up fugitive slaves to their masters, he says: “These two

provisions show, conclusively, that neither the description of persons therein referred to, nor their descendants, were embraced in any of the other provisions of the Constitution." p. 411. And again: "The only two provisions, which point to them and include them, treat them as property." p. 425. What then becomes of that clause of the Constitution which directs that "representatives shall be apportioned among the several States according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons"? We all know that this clause was thus framed with the very object of allowing the slaveholding 23 States a partial representation for their slaves, and that such has been the practical construction for nearly seventy years; but if even free negroes are not to be counted as persons, this practice must be abandoned.

The Chief Justice evidently does not mean to be misunderstood in this matter, for, in speaking of the condition of the African race in this country at the time of the Declaration of Independence, and of the framing and adoption of the Constitution of the United States, he tells us: "They had for more than a century before been regarded as beings of an inferior order; and so far inferior, that they had no rights which the white man was bound to respect;" and "were never thought of or spoken of except as property." pp. 407, 410. But the Constitution of the United States uniformly speaks of them, even when enslaved, as "persons" — "persons" in determining the apportionment of representatives and direct taxes among the several States — "persons," the migration or importation of whom should not be prohibited by congress before 1808 — "persons," still, who, if they escape from service or labor, shall be delivered up. That Constitution further provides: "No *person* shall be deprived of life, liberty, or property, without due process of law." The substance of this provision had been familiar to the people of this country and their English ancestors for many centuries. The great English charter declared: " *Nullus liber homo capiatur, vel imprisonetur, aut disseisetur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judictum parium suorum, vel per*

legem terrae. Nulli vendemus, nulli negabimus, aut differemus, rectum vel justitiam. ” On which Lord Coke remarks: “ *Nullus liber, &c.* This extends to villeins, saving against their lord, for they are free against all men, saving against their lord,” 2 Inst. 45; and, in support of this, refers to Littleton, section 189, where it is said: “Every villein is able and free to sue all manner of actions against every person, except against his lord, to whom he is villein. And yet in certain things he may have against his lord an action,” of which many examples are then given, the most remarkable of which is in section 193: “Also, if a villein sueth an action of trespass, or any other action, against his lord in one county; and the lord saith that he shall not be answered, because he is his villein regardant to his manor in another county; and the plaintiff saith that he is free, and of a free estate, and not a villein; this shall be tried in the county where the plaintiff hath conceived his 24 action, and not in the county where the manor is; and this is in favor of liberty.” To which Lord Coke adds, quoting from Chief Justice Fortescue: “ *Impius et crudelis judicandus est, qui libertati non favet. Angliœ jura in omni casu libertati dant favorem.* ” Co. Lit. 124 *b.* If Chief Justice Taney's construction of the Constitution be sound, liberty has not gained much in six hundred years, notwithstanding the extension of the rights of a “ *liber homo* ” to all “persons.”

II. Having disposed of the plea in abatement, we come to the questions raised by the statement of facts. But let us turn aside, for a moment, to consider an important point of practice. The course of the Chief Justice and of those of his associates who agreed with him in holding that the decision of the first plea disposed of the cause, but who, notwithstanding, proceeded to consider the case on its merits, was so severely criticized by the dissenting judges, that the Chief Justice and Mr. Justice Wayne, in their opinions as now printed, (pp. 427, 455,) reply quite elaborately to these comments, which officially appear to have been the last opinions delivered. The Chief Justice says, in substance, that it is the practice of every appellate court to correct all errors which appear on the record; and makes the further assertion, in which he is supported by Mr. Justice Wayne, that the cases in which the supreme court of the United States has refused to do so, after

deciding against the jurisdiction, were cases which came up from the State courts, and in which, therefore, the question was, whether the supreme court itself had jurisdiction, and, if that question were decided in the negative, no right could remain to consider the other questions presented by the record; but that, as this case came from an inferior court of the United States, it was the duty of the supreme court to set that court right on all points presented on the record and argued by counsel. Although the Chief Justice, on page 429, asserts this to be the "daily practice of this court," and Mr. Justice Wayne, on page 455, says that "the cases cited by the Chief Justice," on this point, "speak for themselves," no cases are cited by the Chief Justice; and it may be safely affirmed that it is not usual for any appellate court to express an opinion on other points, after deciding a question which finally disposes of the case, unless to save further litigation between the parties in courts of the same jurisdiction. But here future litigation in courts of the same jurisdiction was impossible, for if the plea in abatement were good, these further questions could 25 not arise in the federal courts within any State, between these parties, nor indeed in any suit to which a descendant of negro slaves was a party. And this disposes of the alleged distinction between writs of error to State and to federal courts; for since the effect of the decision is that the State courts are the only tribunals which can try this case, the same reason holds for refusing to discuss the other questions, as if the case had been brought directly from a State court. But as the question raised by the plea in abatement now turns out not to have been decided, we are necessarily brought to consider the facts on which judgment was rendered against the plaintiff in the court below, which we will briefly recapitulate:

The plaintiff, being a slave in Missouri, was taken by his master to a military post in the State of Illinois, and there held as a slave for two years; thence taken to a military post in Territory where slavery was prohibited by the act of congress, known as the Missouri Compromise Act, and there held as a slave for two years; and thence carried back into the State of Missouri, where the supreme court of that State held him to be still a slave. The question of most interest, argued upon these facts, is whether that part of the Missouri

Compromise Act is constitutional, which prohibits slavery in the Territory of the United States lying north of 36° 30# north latitude. It has been supposed that if the supreme court did not decide the question of the citizenship of negroes, they did decide against the validity of this prohibition. It is true that six of the judges expressed their opinions that it was unconstitutional and void; but it is easy to show that the point was not judicially determined.

The court, as we have shown, undoubtedly did decide that the plaintiff was a slave when this suit was brought; and in order to arrive at this conclusion, they must have held, either that he never became entitled to his freedom, or that, having acquired such a right, he lost it by his return to Missouri. But in order to determine the case upon the first ground, it must have been held, not only that the plaintiff did not become entitled to freedom in the Territory, but also that he could not have asserted such a right in Illinois—a position which most of the judges do not even suggest. On the contrary, the decision, so far as the residence in Illinois is concerned, is put distinctly upon the ground, that the laws of Illinois could not operate on the plaintiff after his return to Missouri. This decision disposes equally of his 3 26 residence in the Territory, for his stay in each place was for an equal time, and for similar purposes. The whole case being thus disposed of, the opinion on the Missouri Compromise Act was clearly extrajudicial.

A fuller demonstration of this, if desired, will be found in the opinions of the judges. The Chief Justice, on page 452, says: “As Scott was a slave when taken into the State of Illinois by his owner, and was held as such, and brought back in that character, his *status,* as free or slave, depended on the law of Missouri, and not of Illinois.” With equal force he might have said: “As Scott was a slave when taken into the Territory of the United States by his owner, and was there held as such, and brought back in that character, his *status,* as free or slave, depended on the law of Missouri, and not on the act of congress.” Mr. Justice Nelson, “conceding, for the purposes of the argument, that this provision of the act of congress is valid within the Territory for which it was enacted,” holds “that the question involved is one depending solely upon the law of Missouri.” p. 465. Mr. Justice

Campbell says that “the claim of the plaintiff to freedom depends upon the effect to be given to his absence from Missouri, in company with his master, in Illinois and Minnesota, and this effect is to be ascertained by a reference to the laws of Missouri.” p. 493. Mr. Justice Wayne concurs with the Chief Justice, and Justices Grier and Catron concur with Mr. Justice Nelson. pp. 454, 464, 519. These are all the judges, but one, who concur in the judgment of the court; and we thus see that four of them expressly say that the whole case is to be determined by the law of Missouri; and that the other two substantially assert the same thing, by saying that the law of Missouri disposes of any right alleged to be derived from the residence in Illinois. It is clear, therefore, that by the established doctrine of the supreme court of the United States, which we have already stated, the opinions expressed upon the validity of the Missouri Compromise Act, not being necessary to the decision, would not be regarded by that court as of any judicial authority if the question should come before them again. And Mr. Justice McLean is justified in his somewhat indignant protest: “In this case, a majority of the court have said that a slave may be taken by his master into a Territory of the United States, the same as a horse, or any other kind of property. It is true this was said by the court, as also many other things which are of no authority.” “I shall certainly not regard it as such.” pp. 549, 550.

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There being no judicial decision of this point, the individual opinions of the judges are severally entitled to the weight due to the intrinsic strength of reasoning of each, and to the legal eminence of a Taney, a Campbell, a Grier, a Catron, a Wayne, or a Daniel. Without derogating from the respect due to the high office of the learned judges, we shall endeavor to show that the weight of argument and authority clearly preponderates against their conclusion. And we shall derive much assistance in this attempt, from the opinions previously expressed by themselves and their predecessors, as well as from the practical construction of the powers of congress, as acted on by the other departments of the government, from the adoption of the Constitution to the present time.

In order to understand this question, it will be necessary to give a brief historical sketch of the manner in which the United States have acquired and held those extensive domains which have always been known as the Territories of the United States. At the close of the Revolutionary War, there remained within the limits of the United States, and west of the old thirteen States, large tracts of unsettled lands. These lands had been the subject of much anxiety and discussion; the claims of several of the States to portions of them were conflicting, on the one hand; and on the other, it was urged, in behalf of the general government, that they ought to be considered as common property, conquered from the Crown of Great Britain by the efforts of all the States, and should he under the control of congress, to be applied as a common fund to the extinguishment of the war debt, and to be prepared for settlement and subsequent admission into the Union, as States. These last opinions, adopted by many of the most patriotic and influential men of the time, were beginning to prevail, and had before 1787 led to cessions by the States of New York, Virginia, Massachusetts, Connecticut, and South Carolina. In that year the congress of the Confederation provided for the government of the principal part of the lands thus ceded, by the celebrated “Ordinance for the government of the Territory of the United States northwest of the river Ohio.” This act, besides providing for a government of the Territory, complete in all departments, executive, legislative, and judicial, and establishing rules for the descent, distribution, and conveyance of property, contains six fundamental articles, providing for the eventual division of the Territory into distinct republican States, to be admitted “into the congress 28 of the United States on an equal footing with the original States in all respects whatever,” and also including a number of provisions, in the nature of a Bill of Rights, among which are the following: “No man shall be deprived of his liberty or property but by the judgment of his peers or the law of the land.” “There shall be neither slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted; provided always that any person escaping into the same from whom service or labor is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor as aforesaid.” The power of the congress of the Confederation to

pass this ordinance, and to provide for the admission of new States into the confederacy, having been doubted, the following clauses wese introduced into the Constitution:

“New States may be admitted by the congress into this Union, but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the congress.”

“The confess shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice the claims of the United States or of any particular State.”

The first congress of the United States, under the Constitution, at its first session, passed an act, the express purpose of which, as declared in the preamble, was that the Ordinance of 1787 should continue to have full effect. At the second session of this congress, a grant from North Carolina of lands south of the Ohio was accepted, and an act was passed for the government of the ceded Territory. Similar acts were soon afterwards passed for the government of the Mississippi Territory, in which the State of Georgia claimed rights which were afterwards compromised. Upon the acquisition of the Louisiana Territory by treaty from France in 1803, of the Florida Territory from Spain in 1819, and of New Mexico from Mexico in 1848, congress passed similar acts organizing territorial governments over these countries, and has ever since continued to govern them in the same manner, until their admission into the Union as States.

Whence is the power derived, which has been so repeatedly 29 exercised by congress? It has usually been found in that clause of the Constitution which we have just cited, granting power to congress “to make all needful rules and regulations respecting the Territory or other property belonging to the United States.” Taking these words in their literal sense only, there would seem to be no doubt of their meaning. Sir William Blackstone, whose

commentaries were at least as familiar to the framers of the Constitution, as they have been to all statesmen and lawyers since their times says that “municipal or civil law is the *rule* by which particular districts, communities, or nations are governed.” 1 Bl. Com. 44. And the word “regulation” is frequently used in the Constitution in a similar sense. Thus no fugitive slave is to be discharged from service by reason of “any law or regulation” in the State to which he escapes. Another familiar instance is the power given to congress to “regulate commerce,” of which Chief Justice Marshall said: “It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.” “If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in congress as absolutely as it would be in a single governments having in its Constitution the same restrictions upon the exercise of the power as are found in the Constitution of the United States.” *Gibbons* v. *Ogden,* 9 Wheaton, 196, 197.

All the text writers of authority agree in this view of the clause cited. Thus Chancellor Kent says: “With respect to the vast Territories belonging to the United States, congress have assumed to exercise over them supreme powers of sovereignty. Exclusive and unlimited power of legislation is given to congress by the Constitution, and sanctioned by judicial decisions.” 1 Kent Com. 383. And Judge Story holds similar language: “No one has ever doubted the authority of congress to erect territorial governments within the Territory of the United States, under the general language of the clause, ‘to make all needful rules and regulations.’ Indeed, with the Ordinance of 1787 in the very view of the framers, as well as of the people of the States, it is impossible to doubt that such a power was 3* 30 eemed indispensable to the purposes of the cessions made by the States.” 2 Story on the Constitution, § 1325.

In no previous case in the courts has it been even suggested that the power of congress to govern the Territories was limited in any respect except by the express provisions of the Constitution. The first opinion expressed on this point, is in *Serè* v. *Pitot,* 6 Cranch, 336, decided in 1810, in which Chief Justice Marshall said: “The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could This position be contested, the Constitution of the United States declares that ‘congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.’ Accordingly, we find congress possessing and exercising the absolute and undisputed power of governing and legislating for the Territory of Orleans. Congress has given them a legislature, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively.” Again, in *M'Culloch* v. *State of Maryland,* 4 Wheaton, 422, decided in 1819, the same great judge, after referring to this clause as the source of the power of congress, speaks of the “universal acquiescence in the construction which has been uniformly put” on this clause; and says: “All admit the constitutionality of a territorial government.”

The first case decided by the Supreme Court of the United States, in which any question upon the construction of this clause was directly in issue, and by far the most important case upon this subject, is that of *American Insurance Company* v. *Canter,* 1 Peters, 511, decided in 1828, in which Chief Justice Marshall, speaking of the condition of Florida between the times of its acquisition by treaty, and its becoming a State, said: “In the meantime Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution, which empowers congress ‘to make all needful rules and regulations respecting the Territory and other property belonging to the United States.’ Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern, may be the inevitable

consequence of the right to acquire territory. Whichever may be the source whence the power may 31 be derived, the possession of it is unquestioned." 1 Peters, 542, 543. And the court accordingly held that the power of congress was so general, that it might establish a local legislature in the Territory, with power to create a territorial judiciary; and that a judiciary so established might exercise jurisdiction over subjects intrusted by the Constitution to courts of the United States exclusively, although such territorial judges were appointed for a term of years only, while the Constitution requires that the judges of all the courts of the United States shall hold office during good behavior. The result, that the constitutional safeguards of the independence of the judiciary did not extend to the Territories, was reached by holding that congress possessed unlimited power to establish a government over the Territories, complete in all its departments, and organized in any way that congress in its discretion might think fit; and could not have been arrived at by any other course of reasoning.

Mr. Justice Thompson, in 1840, when delivering an opinion of the court, after referring to the power of congress to rule and regulate the Territories, and citing from the case just stated, says that "this power is vested in congress without limitation, and has been considered the foundation on which the territorial governments rest." *United States* v. *Gratiot,* 14 Peters, 537. And in 1854, Mr. Justice Wayne, in delivering the unanimous opinion of all the judges who took part in the decision of the case of Dred Scott, to the point that duties could be lawfully exacted on imports into California, after the treaty of peace with Mexico, by a collector appointed by the military governor of that Territory, said: "The Territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States under the Constitution, by which power had been given to congress to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States, with the power also to admit new States into this Union, with only such limitations as are expressed in the section in which this power is given." The learned judge further stated that the right inference from the failure of congress

at once to put an end to the military government was, that it was intended to be continued until changed by congress; and in confirmation of the views he had expressed, quoted the passage which we have given from the case in 1 Peters, and referred to the case in 14 32 Peters, as repeating and reaffirming what had been there decided. *Gross* v. *Harrison,* 16 Howard, 193, 194.

The opinions of the judges who maintain that congress had no power to prohibit slavery in the Louisiana Territory, are founded upon positions so various, and sometimes even contradictory, that we must examine them separately. It is difficult to account for the comparative silence of a judge of the vigor of mind and uncommon independence of Mr. Justice Grief — remarkable, even above his brethren, for expressing his own opinion, whether of concurrence or dissent, but who in this case contents himself with simply concurring with the Chief Justice — excepting upon the supposition that his own mind was not entirely convinced, but that he was willing to yield on this question to the opinion of the majority of his brethren.

Of the opinions expressed, the first in logical order, because most restrictive of the power of congress, is that of Mr. Justice Campbell. This opinion presents, in a subtle and ingenious manner, the view of an able lawyer and statesman of what may be called the extreme Southern school; and so long as he remains upon the bench of the supreme court, there will be no danger that the views of the strongest advocates of State rights will be overruled without fall discussion. A very good illustration of the limited, not to say narrow, construction which this school gives to the Constitution, is found in this opinion. Mr. Justice Campbell thinks that the Territory spoken of in the Constitution is simply the land, belonging to the United States, and that the power to establish rules and regulations is purely incidental, and “is restricted to such administrative and conservatory acts as are needful for the preservation of the public domain and its preparation for sale or disposition.” p. 514. His principal argument in support of this view is, that the men, who resisted with arms the assertion by Great Britain of an unlimited power of legislation over the colonies, could not have intended to grant a similar power to the federal government

over the inhabitants of the Territories; and therefore the words used should receive the strictest construction. He asserts, what is indeed the necessary consequence of his doctrine, that the people of the Territory, when sufficiently numerous, must govern themselves, and adds that how much municipal power they may exercise cannot be determined by the courts of justice, but must depend on political considerations.

It is a sufficient answer to this argument, which is advanced by no other one of the judges, that it is in direct 33 conflict with all judicial and legislative precedent, as appears from the summary which we have already given. And Mr. Justice Campbell himself refutes his own argument by admitting that congress may perhaps have the power of selecting "suitable laws for the protection of the settlers, until there may be a sufficient number of them to form a self-sustaining municipal government," and that "to mark the bounds for the jurisdiction of the government of the United States within the Territory, and of its power in respect to persons and things within the municipal subdivisions it has created, is a work of delicacy and difficulty, and, in a great measure, is beyond the cognizance of the judiciary department of that government." p. 514.

The Chief Justice argues that "the Territory" of the United States means only the Northwest Territory, a frame of government for which had already been provided by the Ordinance of 1787, but which might need some additional "rules and regulations" to adapt it to the new order of things; and that the use of the words "territory and other property" shows that it was not intended to grant a general power of legislation over future acquisitions, but points to a specific and definite subject, namely, the Territory then belonging to the United States. The purpose of this argument, as stated by himself, on page 442, is to escape from the effect of the act of the first congress, confirming the Ordinance of 1787, which prohibited slavery in similar terms to those of the Missouri Compromise Act, and of the numerous decisions of the State courts upholding and enforcing that prohibition. But this construction ignores the fact, that, at the time of the adoption of the Constitution, cessions were expected of other Territories, which were afterwards received and governed; and does not dispose of the decisions which we have

cited, for they all concerned Territory acquired since the adoption of the Constitution. And the remark of Mr. Justice McLean is, of itself, a complete answer: “The Constitution was formed for our whole country. The expansion or contraction of our Territory required no change in the fundamental law.” p. 544.

Indeed this position of the Chief Justice becomes immaterial, by his admission on page 443, that confess possesses the general power of legislation over the Territories; and although he prefers to derive this power by necessary implication from the power to acquire Territory by conquest or treaty, rather than from the express grant in the Constitution, he gives no reason why the power arising by implication 34 should be more restricted than if it had been expressly granted.

Mr. Justice Catron expressly admits the general power of congress, saying: “More than sixty years have passed away since congress has exercised power to govern the Territories, by its legislation directly, or by territorial charters subject to repeal at all times; and it is now too late to call that power into question, if this court could disregard its own decisions, which it cannot do, as I think.” “It is asking much of a judge who has for nearly twenty years been exercising jurisdiction from the Western Missouri line to the Rocky Mountains, and, on this understanding of the Constitution, inflicting the extreme penalty of death for crimes committed where the direct legislation of congress was the only rule, to argue that he had all the while been acting in mistake and as an usurper.” p. 523. But he has a view peculiar to himself in respect to this particular Territory, namely, that a prohibition of slavery there is contrary to the treaty of 1803, which, after providing, in the clause we have already quoted, for the admission of the inhabitants into the Union as citizens, stipulates that “in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion they profess.” To this there are many answers. First, It does not restrain congress from prohibiting the admission of a particular kind of property, for reasons of public policy, into one part of the Territory. Secondly, This provision addresses itself to congress exclusively; for a contract, made by the political department of the government with a foreign nation, can be enforced only by the nation

with which it is made, and not by the judiciary department of the government which makes the contract. *Foster* v. *Neilson,* 2 Peters, 253; *Garcia* v. *Lee,* 12 Peters, 511; *Taylor* v. *Morton,* 2 Curtis, C. C. 454. Thirdly, The treaty protected the property of the inhabitants only until their admission into the Union, and all who were slaveholding inhabitants of the Territory at that time have since been so admitted in the States of Louisiana, Arkansas, and Missouri; and thereby this stipulation ceased to have any effect. *New Orleans* v. *De Armas,* 9 Peters, 235. And if there were any inhabitants not so admitted, the act, even if inoperative against them, would be valid as to all other persons.

Nearly all the judges who think that congress has no power to prohibit slavery in the Territories rely, more or less distinctly, upon an argument brought forward by Mr. 35 . Calhoun in 1847, when this doctrine was first broached, which is to this effect: That the Territories are acquired by the common blood and treasure, and are to be held for the common benefit of the whole people of the United States, and that any measure which gives an advantage in the use of this property to one class or section is a breach of trust by congress, and therefore void. It is undoubtedly true that congress is a trustee for the whole people; but, in the words of Mr. Justice Curtis: “The Territory was acquired for them in their collective, not their individual capacities. It was acquired for their benefit as an organized political society, subsisting as ‘the people of the United States,’ under the Constitution of the United States; to be administered justly and impartially, and as nearly as possible for the benefit of every individual citizen, according to the best judgment and discretion of the congress; to whose power, as the legislature of the nation which acquired it, the people of the United States have committed its administration.” p. 626. And the courts have no power to revise the action of congress on this matter, if it should be thought unjust. The establishment or prohibition of slavery is a question of policy, involving many considerations, but all of a strictly political nature. Even Mr. Calhoun evidently did not consider that such a prohibition would be strictly, and in its legal sense, unconstitutional; for not only had he approved the Compromise Act as one of the members of President Monroe's Cabinet, and voted for acts of a similar nature; but after his resolutions had been

presented, he and his friends voted to extend the compromise line to the Pacific Ocean in 1848, and again for the act of 1850 establishing a territorial government for New Mexico, which reaffirmed the prohibition of slavery in Texas north of that line. The power to prohibit slavery is one of the ordinary powers of legislation, which has been exercised in all those States which are now free, and also by congress from the foundation of the government. The Ordinance of 1787, which all the judges, with the exception of Mr. Justice Daniel, consider to have been valid after it was re-enacted by the first Congress, prohibited it. So did the several acts for the government of the Territories of Indiana, Illinois, Michigan, Wisconsin, Iowa, and Oregon, and the act for the admission of Texas. Yet all these Territories were acquired by the common efforts and held for the common good; and the cessions by Virginia and the other States expressly recognize and are founded upon this fact.

But the most novel and startling argument of all is, that 36 the prohibition of slavery in a Territory Of the United States is a violation of the provision of the Constitution, that “No person shall be deprived of life, liberty, or property without due process of law.” There is at least as much ground to say that this clause prohibits slavery in all the Territories of the United States. If the construction suggested be sound, the words have been misunderstood for ages. They are contained in every written Constitution with which we are acquainted; borrowed from *Magna Charta,* they have been inserted in the Constitution of every State of the Union, as well those which prohibit, as those which allow slavery; they are found in the Ordinance of 1787, side by side with the clause by which slavery is prohibited. If this new doctrine be true, emancipation by operation of law without, the consent of the master is impossible; all the decisions by which slaves brought from one State into another have been held to become free, under any circumstances, are founded in error; and the Supreme Court of the United States, in 1844, unconstitutionally deprived a slaveholder of his property, by declaring that a slave carried from one part of the District of Columbia into another became free by the operation of the laws of Maryland continued in force by act of congress. *Rhodes* v. *Bell,* 2 Howard, 397. That case is also a judicial

refutation of Mr. Calhoun's doctrine; for it cannot be pretended that the citizens of any part of the United States are entitled to greater rights in a distant Territory, than in the District of Columbia, the seat of the national government.

III. The notion entertained by many persons, that it was decided in the case of Dred Scott, that a slave may be taken by his master into a State where slavery is prohibited by law, and yet not be entitled to claim his freedom there, is not justified by the positions announced by any judge as the ground of his opinion; though we fear it may be a fair inference, if not an unavoidable consequence, of the assumption that the Constitution guaranties the right to take slaves wherever the master may please, within the Territory of the United States.

But on this point the law of England, as well as of this and all other civilized countries, is too well settled to require an accumulation of authorities. Most of them are collected by Mr. Justice Story, in section 96 of his Treatise on the Conflict of Laws, where he says: “There is a uniformity of opinion among foreign jurists, and foreign tribunals, in giving no effect to the state of slavery of a party, whatever it 37 might have been in the country of his birth, or of that in which he had been previously domiciled, unless it is also recognized by the laws of the country of his actual domicil, and where he is found, and it is sought to be enforced. In Scotland the like doctrine has been solemnly adjudged. The tribunals of France have adopted the same rule, even in relation to slaves coming from and belonging to their own colonies. This is also the undisputed law of England. It has been solemnly decided that the law of England abhors, and will not endure the existence of slavery within the nation; and consequently, as soon as a slave lands in England, he becomes *ipso facto* a freeman, and discharged from the state of servitude. Independent of the provisions of the Constitution of the United States, for the protection of masters in regard to domestic fugitive slaves, there is no doubt that the same principle pervades the common law of the non-slaveholding states in America; that is to say, foreign slaves would no longer be deemed such after their removal thither.”

That no particular purpose or length of residence of the master in the free country is requisite to give the slave the right to claim his freedom there, is established by the leading case of *Sommersett,* decided by the court of King's Bench in 1772; for the return to the writ of *habeas corpus* in that case showed that the master came with his slave from Virginia to England, merely for the purpose of transacting certain business, and with the intention of returning as soon as he had finished it; and that the respondent, who was captain of a vessel lying in the Thames, and bound for Jamaica, held Sommersett under directions from his master to take him to Jamaica, and there sell him as a slave. And the court held that the slave was entitled to be discharged, Lord Mansfield saying, “The state of slavery is so odious, that nothing can be suffered to support it, but positive law.” 20 Howell's State Trials, 82; Lofft, 19. And the same doctrine had been declared in even stronger terms in the court of chancery ten years earlier, on a bill in equity, filed by an administrator, to recover back a sum of money presented by his intestate on a death-bed to a nero who had been brought to England as a slave. The suit was apparently founded on the supposition that the negro was still a slave, and therefore incapable of receiving a gift. But Lord Chancellor Northington delivered the following opinion: “As soon as a man sets foot on English ground, he is free; a negro may maintain an action against his master 4 38 for ill usage, and may have a *habeas corpus,* if restrained of his liberty. Bill dismissed, with costs.” *Shanley* v. *Harvey,* 2 Eden, 126. Even Lord Stowell, who thought that a slave, by returning to a colony where slavery legally existed, resumed in all respects the condition of slavery, (a theory which we shall be obliged to examine presently,) expressly admits the law to be well settled “that slaves coming into England are free there, and that they cannot be sent out of the country by any process to be there executed.” *The Slave Grace,* 2 Hagg. Adm. 118. So that the English courts of common law, equity, and admiralty, all concur in opinion to this extent.

The same doctrine has been affirmed by the supreme court of the United States. “The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognized in Sommersett's ease, which

was decided before the American Revolution." *Prigg* v. *Commonwealth of Pennsylvania,* 16 Peters, 611, 612.

Like decisions have been made in every free State in which the question has arisen. And the same rule has been often recognized by the courts of slave States, but as the question necessarily arose before them after the slave's return, they will be considered more appropriately under our next head. The only instance, known to us, in which the courts of a State where slavery is prohibited by law have recognized the right of a master, under any circumstances, to restrain his slave of his liberty in that State, is the decision of the supreme court of Illinois in *Willard* v. *People,* 4 Scam. 461, and that was the case of a mere passage through Illinois from the slave State of Kentucky on the one side to the slave State of Missouri on the other. A contrary decision was made by Judge Paine of the superior court of New York, in *People* v. *Lemmon,* 5 Sandf. 681; and in the case of *Commonwealth* v. *Fitzgerald,* 7 Law Reporter, 379, Chief Justice Shaw discharged a slave in attendance upon his master, an officer in the navy of the United States, upon the vessel's coming, by order of a superior officer, into a port of Massachusetts. But a consideration of the question of the right of mere transit is not within the scope of this article; for, whether Dred Scott acquired a technical domicil or not, either in Illinois or in the Territory, the facts agreed show that he had an actual residence in each place for two years.

IV. Taking it then to be undisputed and indisputable that a slave taken by his master into a free State, and 39 residing there, either temporarily or permanently, is entitled to claim his freedom there, we come to a question upon which there is a greater conflict of authority, namely, what is the *status* or condition of a slave who does not avail himself of that right, but returns with his master to a slave State. This question, as it seems to us, may be most satisfactorily solved by the application of a few elementary principles.

The following maxims are to be found in the Institutes of Justinian: " *Omnes homines aut liberi sunt, aut servi." "Libertas est naturalis facultas ejus, quod cuique facere libet, nisi*

si quid vi aut jure prohibetur." "Servitus est constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur. " Lib. 1, tit. 3. And these definitions hold good to this day; for, under every system of law, all men are either freemen or slaves; freedom is the natural power to do what one pleases, unless restrained by force or law; and slavery is an institution of positive law, by which one man is subjected to the dominion of another, against nature.

The three principal maxims laid down by Huberus for determining all questions arising from the conflict of laws, and which have been universally followed, are thus translated by Story: "The first is, that the laws of every empire have force only within the limits of its own government, and bind all who are subjects thereof, but not beyond those limits. The second is, that all persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof. The third is, that the rules of every empire from comity admit that the laws of every people, in force within its own limits, ought to have the same force everywhere, so far as they do not prejudice the powers or rights, of other governments, or of their citizens." Story on Conflict of Laws, § 29. It follows that the condition and capacity, impressed upon a person by the law of his birthplace, follow and accompany him everywhere, until he comes to reside, either temporarily or permanently, in a country whose policy prohibits that condition, or refuses to recognize that capacity, and he then changes his condition, and becomes incapable of performing those acts which the law there does not recognize his right to perform. On his return to the country of his birth, or to another State whose laws are similar, he may perhaps reacquire the capacity he had lost, so far as that can be done consistently with the rights of others; but the new condition he has assumed will not be changed, unless that 40 condition is contrary to the policy of the State to which he returns. And this seems to be the result of all the rules laid down in Huberus *de conflictu legum,* §§ 2, 12, 13, to whom we refer, not only because there is no civilian of higher authority, but also because Mr. Justice Nelson, by citing some parts only of these sections, makes him appear to support a different theory.

The effect of the above principles, as applied to the case of a master and slave going together from a State where slavery is allowed, to a free State, and there residing for a time, and thus becoming subject to its laws, even if they do not acquire a domicil, and then returning together to a slave State, would seem to be this: By the removal into a State where slavery is prohibited by law, the master loses his right of control, and the slave becomes a freeman; and on the return of both to the State where slavery is allowed, the former slave remains free, unless the laws of the State either utterly forbid emancipation, or expressly make a person of his condition, color, or antecedents a slave as soon as he comes within the limits of the State.

Those who deny this result, usually rely, as a foundation for their argument, upon the theory that laws which prohibit slavery affect only the master's right of control, and not the condition of slavery; or as Lord Stowell, after admitting the law, as laid down by Lord Northington, that a negro may maintain an action against his master for ill usage, and may have a *habeas corpus,* if restrained of his liberty, states it, “The law of England relieves him in these respects from the rigors of the slave code while he is in England; and that is all that it does.” 2 Hagg. Adm. 117, 118. But the law recognizes no intermediate condition between freedom and slavery; and as slavery consists only in subjection to the dominion of the master, it is somewhat difficult to understand how that dominion can be taken away, and yet the state of slavery continue. Such a construction, instead of giving full effect to the Constitution or law which prohibits the existence of slavery at all, makes it recognize slavery as a right, and only refuse the master the means necessary to enforce that right.

It is not necessary to quote the different forms of words by which slavery is prohibited in the Constitutions and laws of other Northern States; but it would be difficult to frame more apt words of utter denunciation and prohibition than those of the Ordinance of 1787, which have been adopted in the Constitutions of all the States formed 41 out of the Northwest Territory: “There shall be neither slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes whereof the party shall have been duly

convicted," or as it is expressed in the Missouri Compromise Act: "Slavery and involuntary servitude," otherwise than for crimes, "shall be and is hereby forever prohibited." It is true that each of these territorial acts contains a proviso for the return of fugitive slaves; but the clause of the Constitution of the United States upon that subject is universally admitted not to apply to any slaves but those who escape from the State where they are held into another; and it is only material to be referred to in this connection, as showing that its framers not only understood that slavery was a mere municipal regulation of the State in which the slave was held "under the laws thereof," but that the slave, on escaping into another, would, but for this clause, be "discharged" from such service.

But it is then argued that the view above stated secures the personal rights of the slave, at the expense of the right of property of the master, which being acquired by the laws of his domicil, must, by the comity of nations, be deemed his property everywhere. Without repeating the clauses of the Constitution of the United States, which uniformly speak of slaves as persons, and not as property, (because, as Mr. Madison said, its framers "thought it wrong to admit in the Constitution that there could be property in men,") one answer to this argument is well stated by Chief Justice Shaw: "The argument can apply only to those commodities which are everywhere, and by all nations, treated and deemed subjects of property. But it is not speaking with strict accuracy, to say that a property can be acquired in human beings, by local laws. Each State may, for its own convenience, declare that slaves shall be deemed property, and that the relations and laws of personal chattels shall be deemed to apply to them; as for instance, that they may be bought and sold, delivered, attached, levied upon, &c. But it would be a perversion of terms, to say that such local laws do in fact make them personal property generally; they can only determine that the same rules of law shall apply to them as are applicable to property, and this effect will follow only so far as such laws *proprio vigore* can operate." *Commonwealth* v. *Aves,* 18 Pick. 216.

An equally conclusive answer to the argument founded on the supposed rights of the master is, that the master, 4* 42 by taking his slave into a country where slavery is

prohibited, voluntarily consents to the effect of those laws, and so himself manumits the slave. As Lord Coke says: “There be two kinds of manumissions, one express, and the other implied. Express, when the villein by deed in express words is manumised and made free. The other implied, by doing some act that maketh in judgment of law the villein free, albeit there be no express words of manumission or enfranchisement. *Leges Angliœ semel manumissum semper liberum judicant.* ” Co. Lit. 137 b. The same principles are recognized in the code of slavery in this country; as proofs of which one or two cases in the supreme court of the United States will suffice. In the words of Mr. Justice Wayne, in delivering its opinion in *Fenwick* v. *Chapman,* “What is manumission? It is the giving of liberty to one who has been in just servitude, with the power of acting, except as restrained by law.” 9 Peters, 472. Any act of the master towards the slave, inconsistent with an intention to retain full control over the slave or his acquisitions, is a manumission. Thus a devise or bequest of property, by a master to his slave, entitles the slave to freedom by necessary implication. *Le Grand* v. *Darnell,* 2 Peters, 670.

The slave, then, being absolutely free while in the free State, if his return changes his condition and remands him to slavery again, it must be either by reason of his own implied consent, or of the effect of the laws of the State into which he returns. But neither the old English law of villenage, nor the American law of slavery, will allow a man to become a slave by his own consent merely. This is so well stated in the old books that we cannot but recur to them once more, and we know the attention of our readers is not so often called to those free principles of the common law which were the seed of our liberties, as to make an allusion to them entirely unprofitable. Littleton tells us: “Every villein is either a villein by title or prescription, to wit, that he and his ancestors have been villeins time out of mind of man; or he is a villein by his own confession in a court of record.” § 175. This is very clearly explained by Lord Hobart: “The body of a freeman cannot be made subject to distress or imprisonment by contract, but only by judgment.” Hob. 61. And again: “By law of nature all men are free, and cannot be brought under the dominion of any, but according to *jus gentium,* viz. the case of captivity, from which our villenage

came. And the confession in the court of record is not so much a 43 creation, as it is in supposal of law a declaration of rightful villenage before, as a confession of other actions; though it is true, as Littleton says, that it shall not bind his issues born before, because the favor of liberty gives them leave to falsify." Hob. 99. To the same effect are Littleton, §§ 176, 18.5; Co. Lit. 117 *b,* 122 *b;* and Hargrave's note 163. The fact that a man might, by confession in a court of record, make himself a slave, no more shows that he could, by mere consent or contract, reduce himself to slavery, than the fact that a plea of guilty will authorize a sentence of death shows that a man may lawfully consent to his own murder. The impossibility of a man's reducing himself to slavery has been well expressed by the court of appeals of Maryland: "Once free and always free, is the maxim of Maryland law upon the subject. Freedom having once vested, by no compact between the master and liberated slave, nor by any condition subsequent, attached by the master to the gift of freedom, can a state of slavery be reproduced." *Spencer* v. *Dennis,* 8 Gill, 321.

The most plausible argument, in favor of the position that the return of the slave re-establishes his original condition of slavery, is that sought to be derived from the law of the State into which he returns. The argument is that, as the laws of any State have no extra-territorial effect, except by the comity of the State in which they are sought to be enforced, and as no State allows laws which are contrary to its own policy to be enforced within its limits, therefore the same rule which sets the slave free on his arrival in a State where slavery is prohibited, makes him a slave again upon his return to a State where slavery is established by law. But the fallacy of this argument is, that while slavery is contrary to the laws of a free State, freedom is not contrary to the policy of a slave State; or, in other words, the laws of a free State make every slave who comes under their operation a freeman, but the laws of a slave State do not usually make a freeman a slave.

If there were any statute of the slave State expressly making a negro a slave upon his return, that would, of course, however unjustly, put an end to the free condition which he had acquired, unless he had resided so long in the free State as to become a citizen thereof, in which case he would, at least while he remained a citizen of that State, be

entitled to protection by virtue of the provision of the Constitution of the United States, by which the citizens of each State are entitled to all immunities of citizens in the other States; for whatever may be the extent of the 44 rights conferred by that clause, it must at least exempt citizens from being made slaves. And it seems to us that it is only in view of this provision that the question whether Dred Scott acquired a domicil in the free State could become at all material, for the two years' residence of his master and himself in Illinois was certainly long enough to subject them to the operation of the laws of that State.

Cases are to be found in the highest court of every slave State in which the question has arisen, recognizing the condition of freedom acquired by a slave who has been submitted, with the consent of his master, to the operation of a Constitution or laws forbidding slavery. Such cases are *David* v. *Porter,* 4 Har. & McHen. 418, in Maryland; *Griffith* v. *Fanny,* Gilmer, 143, and *Foster* v. *Foster,* 10 Grat. 485, in Virginia; *Rankin* v. *Lydia,* 2 A. K. Marsh. 470, and *Mercer* v. *Gilman,* 11 B. Monroe, 210, in Kentucky; and *Blackmore* v. *Phill,* 7 Yerger, 452, in Tennessee. The only disputes have been upon what facts would show the consent of the master, and how long a residence was necessary to give effect to the law of the free State. The decisions in the States of Maryland and Virginia, mutually giving effect to each other's statutes, enfranchising slaves imported contrary to law, strongly tend to the same conclusion; for there is surely no reason why a general law, prohibiting all slavery whatever, should have a more limited effect, in any respect, than a statute conferring freedom on slaves brought into the State under particular circumstances. Such decisions were *Stewart* v. *Oakes,* 5 Har. & Johns. 107, note; and *Hunter* v. *Fulcher,* 1 Leigh, 172.

The only other slave States, so far as we know, in which decisions have been made upon this question, are Missouri and Louisiana; and it is somewhat remarkable, in view of the argument, to which we have already alluded, of the peculiar rights supposed to be secured by the treaty under which the Louisiana Territory was acquired, that no courts have gone farther than those of the States formed out of this Territory, in recognizing the rights of slaves to their freedom, growing out of a residence in a free State or Territory.

The supreme court of Missouri, within the first sixteen years after the admission of that State into the Union, repeatedly decided that a slave residing for any time, either in the State of Illinois or in the Territory of the United States, where slavery was prohibited by act of Congress, was free, and might enforce his right to freedom in the courts of Missouri; and even applied this doctrine to the 45 case of a slave held in Illinois only one month, with the intention of being returned to Missouri; and to that of a slave taken by an officer in the army of the United States, for a temporary residence, to a military post in such Territory. *Julia* v. *McKinney,* 3 Missouri, 270; *Rachael* v. *Walker,* 4 Missouri, 350. But in 1852, in a suit brought by this plaintiff, Dred Scott, to try his right to freedom, two judges, forming a majority of the court, overruled these decisions, in an opinion in which, admitting the constitutionality of the Missouri Compromise Act, and the perfect freedom conferred upon the plaintiff by the laws governing the State and Territory in which he had resided, they refused to give any effect to those laws, because of the spirit which had lately prevailed in the free States in relation to the institution of slavery; but Mr. Justice Gamble, the most distinguished member of the court, delivered a very able dissenting opinion. *Scott* v. *Emerson,* 15 Missouri, 476. For the convenience of our readers, many of whom may not have access to that volume of reports, we give in a note at the end of this article a statement of the case, and all the important parts of each opinion, in the very words of the judges. The decision has since been twice affirmed without any renewed dissent. *Calvert* v. *Steamboat Timoleon,* 15 Missouri, 597; *Sylvia* v. *Kirby,* 17 Missouri, 434. But the new doctrine does not seem to be treated as of universal application; for in a later case concerning such rights acquired in Canada, the same judge who delivered the opinion in Dred Scott's case said: “When any of the negro race, who were reduced to slavery, acquired their freedom under the laws of the country in which they lived, we are aware of no law by which they, except for crime, can be again reduced to slavery.” *Charlotte* v. *Chouteau,* 21 Missouri, 597. This last case was decided less than two years ago, and does not appear to have been brought to the notice of the supreme court of the United States in the case of Dred Scott, probably because it was not reported when that case was argued. The passage just cited would seem to accord better with the doctrine which we

have attempted to maintain, and which was originally established by the supreme court of Missouri, than with the law laid down by that court in the intermediate decisions. But as that court has not expressed any intention to overrule or revise those decisions, the present law of Missouri on this question, so far as it can be ascertained from the decisions of its supreme court, would seem to refuse to recognize rights of freedom acquired by a residence in any 46 place within the United States in which slavery is prohibited, but to give effect to such rights acquired in a foreign country.

No court has more consistently adhered to correct principles on this subject than the supreme court of Louisiana, which has repeatedly held that the fact of a slave having been taken to France, or to any State where slavery or involuntary servitude was not tolerated, operated on the condition of the slave, so as to produce an immediate emancipation; and, as was said by the court in one case, “being free for one moment in France, it was not in the power of her former owner to reduce her again to slavery.” *Marie Louise* v. *Marot,* 9 Louisiana, 473; *Smith* v. *Smith,* 13 Louisiana, 441; *Lunsford* v. *Coquillon,* 14 Martin, 403; *Josephine* v. *Poultney,* 1 Louisiana Annual Rep. 329. Even the statute of Louisiana of 1846, establishing a contrary rule, has been refused any effect on persons who thus acquired a right to freedom before it was passed. *Eugenie* v. *Preval,* 2 Louisiana Annual Rep. 180. And Chief Justice Eustis, in 1847, in the case of a slave who had resided with her master in France two years, (a period exactly equal to that of Dred Scott's residence in Illinois, and also to that of his residence in the Territory,) after citing some of the earlier Louisiana cases, very clearly states the law thus: “It is contended that this case does not come within the principle of those cases, inasmuch as the defendant acquired no domicil in France, as his absence from Louisiana was but temporary, where his property remained and his business continued, and he never lost his original residence. We consider that the jurisprudence of this State has settled this question, which has been more than once the subject of discussion. We cannot expect that foreign nations will consent to the suspension of the operations of their fundamental laws, as to persons voluntarily sojourning within their jurisdiction for such a length of time. As to those thrown on foreign coasts by shipwreck,

taking refuge from pirates, driven by overwhelming necessity, or perhaps those passing through a foreign territory on a lawful journey, their personal condition may remain unchanged; but this is the extent to which an immunity from the effect of the foreign law could be maintained under the laws of nations." *Arsene* v. *Pigneguy,* 2 Louisiana Annual Rep. 621.

The principal authority in support of the opposite view, is the opinion of Lord Stowell in the case of the *Slave Grace,* 2 Hagg. Adm. 94, and as that is the foundation of all 47 similar decisions since, it is important that the case should be clearly understood. It was not, as is often supposed, a suit for freedom, nor was the slave in any way a party to the proceeding, but only the thing, the forfeiture of which was the sole purpose of the suit. It was an information in admiralty, filed in the name of the King by an officer of the customs, on the acts of parliament of 47 and 59 Geo. III, one prohibiting the slave trade, and the other prohibiting the transportation of any person as a slave from one colony to another without a certificate of registry. The counts relied on were three; one for exporting the slave from Antigua to England, and another for bringing her back, without the certificate required; and the third for unlawfully importing her, being a free subject, as a slave from Great Britain to Antigua, "contrary to the form of the statute in such case made and provided." Lord Stowell held that the registry act applied only to slaves transported from one colony to another, and not to those carried to or from the mother country; and that the act prohibiting the slave trade did not apply to the importation of persons who were actually free; and, as the penalty prescribed by each of these statutes, the recovery of which was the only legitimate purpose of this information, was the forfeiture of the slave, (to be apprenticed under the direction of the Crown and ultimately enfranchised,) that the information could not, in any aspect of the case, be maintained; and therefore, according to the uniform practice in admiralty, decreed that the slave, the subject sought to be forfeited, be restored to the custody of the claimant.

But Lord Stowell also proceeded to discuss the general question whether the slave, after her return to Antigua, was to be deemed free, by reason of her residence in England; and

arrived at the conclusion that she was not. The chief arguments on which this conclusion was based were four; first, the limited operation of the law of England upon the condition of the slave, and second, the effect of the slave's voluntary return to the slave colony — both of which questions we have already considered; third, the fact that, though fifty years had elapsed since *Sommersett's case,* no slave, after such return, had claimed his liberty — a fact which could hardly be judicially known, and if true, should not have had greater effect than was allowed by Lord Mansfield to the fact that thousands of slaves were actually held under a claim of right in London, when he declared Sommersett free; and fourth, the countenance given by the laws of Great Britain herself to the existence of slavery 48 in her colonies, under the same imperial jurisdiction; which is suggested by the able Chief Justice of Louisiana, in the case last cited, as the only ground upon which Lord Stowell's opinion on this point is to be supported.

It is worthy of remark that the learned admiralty judge, at the same time that he was treating the reasons of Lord Mansfield in Sommersett's case, as *obiter dicta* and unnecessary to the decision of that case, himself fell into the very irregularity which he insinuates, rather than directly charges, against that great magistrate; for his opinion upon the construction of the statutes on which the information was founded, rendered the question whether Grace was free or slave immaterial to the decision. In a very similar case, the supreme court of the United States, ten years later, did not follow Lord Stowell's example in this respect. Upon a process in admiralty, commenced in behalf of the United States, under the act of congress prohibiting the slave trade, to enforce the forfeiture of a vessel in which a slave, previously carried from Louisiana to France by her mistress, had been brought back to Louisiana, the court placed their decision upon the simple ground that the act of Congress did not apply to the case, Chief Justice Taney, who delivered the opinion, saying: “Even assuming that by the French law she was entitled to freedom, there is nothing in the act of congress under which these proceedings were had, to prevent her mistress from bringing or sending her back to her place of residence, and continuing to hold her as before in her service.” “The language of the act cannot properly be applied to

persons of color who are domiciled in the United States, and who are brought back to their place of residence, after a temporary absence." *United States* v. *The Garonne,* 11 Peters, 77.

No American authority has been so often cited and relied on, as confirming Lord Stowell's view of this question, as that of Chief Justice Shaw. But the few words dropped by that great judge in *Commonwealth* v. *Aves,* 18 Pick. 208, 218, have certainly been treated as expressing a more decided and deliberate opinion than the circumstances under which they were spoken, or the words themselves warrant. The only point adjudged in the case was that a slave brought by her master into Massachusetts, though for a mere temporary purpose, could not be restrained of her liberty here, or carried back into a slave State, without her consent. The question of the effect which a voluntary return would have upon the rights of the slave, was not involved in the decision, and though the case of the *Slave* 49 *Grace* and other similar cases were urged upon the court, with his usual force, by Mr. Justice Curtis, then of counsel for the master, it does not appear that this question was discussed at all by the counsel for the slave; and the intimation of the Chief Justice in favor of the opinion of Lord Stowell is immediately preceded by the distinct statement that it "is a question which was incidently raised in the argument, but is one on which we are not called on to give an opinion in this case, and we give none." 18 Pick. 218.

Such being that case, we venture to suggest that the theory that a slave brought to Massachusetts does not become absolutely free, is not only inconsistent with general principles, but with the Declaration of Rights, quoted in the earlier part of this article. It is not likely that the question of the condition of a slave, after returning to a slave State, can ever directly arise in Massachusetts; but the spirit of her laws in this matter is clearly shown by many adjudged cases. A few years before the case of Aves, Chief Justice Shaw remanded a negro boy, brought before him by writ of *habeas corpus,* to the custody of his mistress, only upon the ground that she, "having, by her return to the writ, disclaimed to hold him as a slave, had made a record of his freedom, and could not make him a slave again in the Island of Cuba;" and further said that "the boy, by the law of Massachusetts,

was in fact free," and if the mistress had claimed him as a slave, he should have ordered him to be discharged from her custody. *Francisco's case,* 9 Amer. Jurist, 490. And in a later case the supreme court refused to allow a negro boy, only seven or eight years old, to be carried back into slavery, even with his own consent, but ordered him to be delivered to a guardian appointed by the judge of probate. *Commonwealth* v. *Taylor,* 3 Met. 72. These cases do not seem to countenance the idea that the law of Massachusetts recognizes the condition of slavery as merely suspended, but still existing, while the master and slave are within her limits. And a negro's voluntary submission of himself and all his future offspring to hereditary slavery would seem to be hardly consistent with the principle of the law of Massachusetts, under which no one was ever born a slave in this Commonwealth, even before the adoption of the present Constitution, as is perfectly well established by a series of reported decisions, beginning with *Littleton* v. *Turtle,* 4 Mass. 128, note, (1796), and ending with *Edgartown* v. *Tisbury,* 10 Cush. 408, (1852,) where all the other authorities 5 50 are collected. The best statement of the law of Massachusetts, that we have seen, is by President Tucker of the court of appeals of Virginia, who, after alluding to the case of the *Slave Grace,* said: "In Massachusetts, however, it seems that the Constitution of the State must have been interpreted to have a more extensive operation; as it appears to have been decided, that the issue of a female slave, though born prior to the Constitution, was free. 2 Kent Com. 205. If this be so, the Constitution has received an interpretation, which goes to divest the title of the master, to break the bonds of the slave, and to annul the condition of servitude. It emancipates and sets free, by its own force and efficacy, and does not await the enforcement of its principles by judicial decision. It is more operative than the common law, and more resembles the effect of our statute, declaring free all slaves imported contrary to law." *Betty* v. *Horton,* 5 Leigh, 623.

We have discussed this question with some care, because Justices Nelson, Daniel, and Campbell intimate opinions that, on general principles, independently of the decisions in Missouri, Scott was a slave after his return, and as Justices Crier and Catron concur generally with Mr. Justice Nelson, such may perhaps be taken to be the opinion of a

majority of the judges. But this opinion is not even suggested by the Chief Justice or Mr. Justice Wayne, and is not entitled to the weight of judicial authority, because it was not necessary to the decision of the case. For we must constantly bear in mind the rule, affirmed by Chief Justice Marshall, that “the positive authority of a decision is coextensive only with the facts on which it is made.” And one most important fact in this case, the effect of which yet remains to be considered, is that the plaintiff, after his return, being then an inhabitant of Missouri, had been declared by the supreme court of that State to be a slave. The decision of that court, not being in form a final judgment, but merely an order granting a new trial, did not, of course, determine the plaintiff's right to freedom, which was the fact in dispute between the parties; but it is evidence of the law of Missouri on the question, and as such is much relied on by the majority of the judges of the supreme court of the United States.

V. That the plaintiff, at the time of bringing his suit in the State court, as well as of suing in the circuit court of the United States, was an inhabitant, and in every sense of the word, a subject, of Missouri, cannot be doubted. It is clear upon the principles and authorities which we 51 have stated in discussing the fourth division of our subject, that he and his master resided so long in the free State and Territory, as to become subject to their laws; but we are inclined to the opinion that the mere fact of the residence of an officer of the navy for two years at a military post, under the orders of his government, does not of itself raise a presumption of change of domicil of the officer or his servant, and that the facts agreed would not therefore warrant an inference that the plaintiff and his master became actually domiciled either in Illinois or in the Territory. But whether this be so or not, the fourteen years' residence of the plaintiff in Missouri after his return before the decision of the State court in his case, is much more conclusive evidence of his having resumed his domicil in Missouri, than the other facts of the case are of his having ever lost it. And the plaintiff in his writ alleged himself to be a citizen of Missouri, and upon that ground only claimed the right to maintain his suit in the courts of the United States.

Measuring the point adjudged, therefore, by all the material facts of the case, it is set forth at length in our head note, or may be briefly stated thus: A slave taken by his master into a State or Territory where slavery is prohibited by law, and afterwards returning with his master into a slave State, and acquiring a residence there, if deemed by the highest court of that State, after his return, to be a slave, must be deemed a slave by the courts of the United States, and therefore not entitled to sue in one of those courts as a citizen of that state. In this conclusion seven of the nine judges concur; and it is best stated by Mr. Justice Nelson, whose opinion is wholly devoted to the question of the plaintiff's condition in Missouri after his return, and is the ablest in reasoning and most judicial in tone of all the opinions of the majority. It also bears conclusive marks on its face of having been prepared to be the opinion of the court, as will be put beyond doubt by a few quotations from it. “In the view *we* have taken of the case,” he says, when speaking of the plea in abatement, “it will not be necessary to pass upon this question, and *we* shall therefore proceed at once to an examination of the case upon its merits.” p. 458. “ *Our* opinion is, that the question is one which belongs to each State to decide for itself, either by its legislature or courts of justice.” p. 459. “ *Our* conclusion therefore is, upon this branch of the case, that the question involved is one depending solely upon the laws of Missouri, and that the federal court sitting in the State, and trying 52 the case before us, was bound to follow it.” p. 465. The single introductory paragraph in which “I” is substituted for “we,” only serves to call more distinct attention to the use of the plural pronoun throughout the opinion.

How much more weight of authority and general acquiescence this decision would have commanded, if the majority of the judges had confined themselves to the point necessary to the judgment, and forborne to express so many extrajudicial opinions, is not within our province to discuss. We have freely exercised the right, which is allowed to every member of the profession, of controverting arguments and opinions advanced on any legal question by any individual, however distinguished by ability or position, so long as it is not judicially adjudged and settled. But upon the single point adjudicated, more deference is due to the

deliberate judgment of the highest tribunal of the country. As two of the judges, however, and those not the least, eminent, do not concur even in the judgment, we feel it to be our duty to examine the soundness of the positions upon which it rests.

There is not a perfect uniformity in the decisions of the supreme court of the United States, defining the extent to which the courts of the United States should follow the decisions of the State courts. But the true principle, which reconciles most of the cases, seems to be that decisions of the State courts are binding in matters of State policy, or questions governed by local rules, as to which it is essential that there be a uniform administration of law within the State, but comparatively immaterial whether the same rules prevail in all the States. Such are cases arising upon the construction of the Constitution and statutes of the State, local usages, or any well settled rules as to the title to real estate, whether depending upon common law, statute, or judicial decision. *Bank of Hamilton* v. *Dudley,* 2 Peters, 524; *Luther* v. *Borden,* 7 Howard, 40; *Nesmith* v. *Sheldon,* 7 Howard, 818; *Webster* v. *Cooper,* 14 Howard, 504; *Jackson* v. *Chew,* 12 Wheaton, 162; *Beauregard* v. *New Orleans,* 18 Howard, 502. But on questions of the law merchant, or general principles of chancery, which are of universal application, and as to which uniformity of construction throughout the States is desirable, the supreme court of the United States does not follow the decisions of the State courts, unless satisfied of their correctness; *Swift* v. *Tyson,* 16 Peters, 18; *Neves* v. *Scott,* 13 Howard, 272; and on those subjects has even refused to allow any effect to statutes of the State. *Boyle* v. *Zacharie,* 6 Peters, 658; 53 *Watson* v. *Tarpley,* 18 Howard, 521. This last fact would seem conclusively to show that the extent to which the courts of the United States will be bound by the decisions of the State courts, does not depend upon the question whether or not those decisions turned upon the construction of a statute of the State.

The determination of the personal *status,* or domestic and social condition of the inhabitants of a State, affects not only their contracts and relations towards each other, but their political rights and duties and their relation to the State itself; and would therefore seem to be, above all others, a subject over which the exclusive control of the State,

except so far as expressly limited by the Constitution of the United States, is essential to the maintenance of the State government, and the preservation of harmony between it and the federal power. As was said by Chief Justice Marshall, in the first of the cases just cited, “the judicial department of every government is the rightful expositor of its law.” And that this maxim extends to the determination of questions depending upon general principles of comity, and of the respect which, consistently with the policy of the State, may be allowed to the laws of other States, is sufficiently shown by the following statement of Judge Story, which has been approved by the supreme court of the United States: “It is not the comity of the courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of the municipal law are ascertained and guided.” Story on Conflict of Laws, § 38. *Bank of Augusta* v. *Earle,* 13 Peters, 589. These reasons apply with peculiar force to the question whether any inhabitant is a slave or citizen; and the Constitution of the United States, far from limiting the rights of the State in this respect, does not authorize any intermeddling by the national government with the relation of master and slave in the States, and, as we have seen, expressly leaves it to the several States to determine who shall be citizens. The same spirit has influenced the only two decisions of the supreme court of the United States upon this subject.

The first, which was decided in 1834 by the unanimous opinion of the court of that day, of whom Mr. Justice McLean is the only survivor, concerned the condition in Tennessee of children of a slave woman, born before the emancipation to which the mother would be entitled under her 10* 54 master's will, took effect. The court said, that if this were an open question, it might be urged with some force that the condition of the children, until their mother's emancipation, was not that of absolute slavery; but was, by the will, converted into a modified servitude, to end when the emancipation should take effect; that if the mother was not an absolute slave, it would seem to follow that the children would stand in the same condition. But upon the ground that by the decisions of the supreme court of Tennessee, although there was no statute on the subject, a female thus situated was

considered a slave, whose manumission was only conditional, and, until the condition happened upon which freedom was to take effect, remained to all intents and purposes an absolute slave, the children were adjudged to be absolute slaves. *M'Cutchen* v. *Marshall,* 8 Peters, 241.

The other case was decided in 1850. It was a suit brought on a statute of Kentucky by the master of slaves, against the captain of a steamboat, to recover the value of slaves escaping into a free State; the defence relied on was that the slaves were free, by reason of having previously been in Ohio with their master's consent; but as it appeared that they had never resided for any time in Ohio, and had remained in their master's service two years after their return, the court of appeals of Kentucky gave judgment for the plaintiff; and the defendant brought the case by writ of error to the supreme court of the United States. And Chief Justice Taney, in delivering the opinion of the court, clearly laid down the doctrine thus: “Every State has an undoubted right to determine the *status,* or domestic and social condition of persons domiciled within its territory; except in so far as the powers of the States in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States. There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine for itself whether their employment in another State should or should not make them free on their return. The court of appeals have determined that by the laws of the State they continued to be slaves. And their judgment upon this point is, upon this writ of error, conclusive upon this court, and we have no jurisdiction over it.” “The 55 Ordinance of 1787, if still in force, could have no more operation than the laws of Ohio in the State of Kentucky, and could not influence the decision upon the rights of the master or the slaves in that State, nor give this court jurisdiction upon the subject.” *Strader* v. *Graham,* 10 Howard, 93, 94. It is true that, as that case came by writ of error from a State court, the point on which the decision turned was

that the supreme court had no jurisdiction of the case under the twenty-second section of the judiciary act of 1789, because the judgment of the State court involved no question arising under the Constitution or laws of the United States. But the passages above cited show the reasons which led the court to this decision. And the remark about the Ordinance of 1787 shows that the refusal of a State to give extra-territorial operation to an act of congress for the government of a Territory was not a decision against any existing right claimed under a law of the United States.

If the law of the State, as declared by its judges, is to finally determine this question, the fact that the State courts formerly laid down the law differently would not seem to be of any importance, provided the new exposition has been so repeatedly affirmed that it must now be considered as the settled law of the State; and that such was the condition of the law of Missouri on this point, at least so far as it was made known to the supreme court of the United States, we have already shown. In former times, the supreme court of the United States was accustomed to follow the decisions of the State courts upon matters within their province, even when contrary to the law as previously established by those courts, and declared by the courts of the United States. *Elmendorf* v. *Taylor,* 10 Wheaton, 165; *United States* v. *Morrison,* 4 Peters, 124; *Green* v. *Neal,* 6 Peters, 298, 299. As was said by Mr. Justice McLean, twenty-five years ago, in delivering the opinion of the court, in the case last cited: “The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it in the second, if the State tribunals should change the construction. A reference is here made not to a single adjudication, but to a series of decisions which shall settle the rule. Are not the injurious effects on the interests of the citizens of a State as great, in refusing to adopt the change of construction, as in refusing to adopt the first construction?”

It must be admitted, however, that in many recent cases the supreme court has refused to be bound by decisions of LC 56 State courts even when construing their own Constitutions or laws, if opposed to former decisions of the same courts, or of the courts of the United States, especially as to contracts made and rights acquired while the first construction

prevailed. *Rowan* v. *Runnels,* 5 Howard, 139; *Ohio Life Insurance & Trust Company* v. *Debolt,* 16 Howard, 431; *Pease* v. *Peck,* 18 Howard, 599. Justices McLean and Curtis, therefore, in refusing to be bound by the more recent State decisions against their own convictions of justice, only followed the modern practice of the supreme court of the United States. And we assent to the present decision as being a return to the older and sounder doctrine; though it must be confessed that the court could hardly have selected, for a revival of that doctrine, a State decision which was a greater violation of general principles of law or of the rights of the party, than the decision of the supreme court of Missouri in the plaintiff's case.

The most striking argument against allowing any binding force to the decision of the supreme court of Missouri is, that, as that decision was expressly founded on a refusal to allow any effect to rights secured by an act of congress admitted by that court to be valid, if the supreme court of the United States should hold itself bound by the decision, it would give effect, in a spirit of comity, to a decision which was arrived at only by refusing a like comity to the laws of the United States. But if, for reasons founded upon public policy, and upon the true relation between the State and federal governments, the political and social condition of the inhabitants of a State is, so far as it is not affected by the Constitution and laws of the United States, to be determined exclusively by the State courts, it can make no difference whether that condition is to be ascertained by a consideration of the Constitution and laws of that State, or of the extra-territorial effect to be given, in a spirit of comity, to other local laws, even if those laws happen to be acts of congress.

The other arguments against the conclusion of the majority of the court are founded on the disregard by the Missouri court of the rights of the plaintiff and his family, and of the helpless condition in which they would be left if the supreme court of the United States should refuse to interpose. But the fact that, when the plaintiff married in the Territory, and returned to Missouri, he was, by the then well settled laws of that State, a freeman, though it proves the injustice of the decision of the State court, surely affords no reason why the courts of the United States should disregard 57 that decision in a matter, the exclusive

determination of which belongs to the State. And the condition of the plaintiff's wife and children was not in issue in this case, for the judgment against the plaintiff was founded upon his personal disability to maintain any action, and on that alone.

We cannot bring this article to a close without saying a word of the opinions of the two dissenting judges, which are certainly entitled to at least as much weight, on any point not directly adjudged by the court, as any of the opinions of the majority. Indeed, as they passed upon no point not necessary to the conclusion at which they thought the court should arrive, they may perhaps be considered as of more judicial authority. Of Mr. Justice McLean it is enough to say that his opinion is worthy of the only surviving associate of Marshall, Washington, Story, and Thompson, and of the judge whose circuit includes the territory consecrated to freedom by the Ordinance of 1787. The opinion of Mr. Justice Curtis is, by the common consent of the profession and of the public, the strongest and clearest, as well as the most thorough and elaborate of all the opinions delivered in this case, and fitly closes with the following admirable definition of judicial duty: “I have touched no question which, in the view I have taken, it was not absolutely necessary for me to pass upon, to ascertain whether the judgment of the circuit court should stand or be reversed. I have avoided no question on which the validity of that judgment depends. To have done either more or less, would have been inconsistent with my views of my duty.”

We have thus examined the four points commonly supposed to have been decided in the case, and shown, so far as we were able, that the court have not, and could not have, consistently with sound principles, decided that a free negro could not be a citizen of the United States; nor that congress had no power to prohibit slavery in the Territories; nor that a master might hold his slave in any free State; nor that the slave, by returning with his master, would necessarily become a slave again. We have also stated the reasons which have led us to acquiesce in the result at which the majority of the court arrived upon the only point necessary to the decision of the case, namely, that the condition of the plaintiff, being now an inhabitant of Missouri, must be conclusively determined by the law of that

State, as declared by its supreme court. How far we have succeeded in our undertaking, our readers must decide.

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Note. — The only report of the facts of the suit of Dred Scott before the supreme court of Missouri, is in the opinion of the majority of the court in that case, and is in these words: “This was an action instituted by Dred Scott against Irone Emerson, the wife and administratrix of Dr. John Emerson, to try his right to freedom. His claim is based upon the fact that his late master held him in servitude in the State of Illinois, and also in that territory ceded by France to the United States, under the name of Louisiana, which lies north of 36° 30#, north latitude, not included within the limits of the State of Missouri. It appears that his late master was a surgeon in the army of the United States, and during his continuance in the service, was stationed at Rock Island, a military post in the State of Illinois, and at Fort Snelling, also a military post in the Territory of the United States, above described, at both of which places Scott was detained in servitude — at one place, from the year 1834 until April or May, 1836; at the other, from the period last mentioned until the year 1838. The jury was instructed, in effect, that if such were the facts, they would find for Scott. He accordingly obtained a verdict. The defendant moved for a new trial on the ground of misdirection by the court, which being denied to her, she sued out this writ of error.” 15 Missouri, 582.

The opinion of the majority of the court was as fellows: “The States of this Union, although associated for some purposes of government, yet, in relation to their municipal concerns, have always been regarded as foreign to each other. The courts of one State do not take judicial notice of the laws of other States. They, when it is necessary to be shown what they are, must be proved like other facts. So of the laws of the United States, enacted for the mere purpose of governing a Territory. These laws have no force in the States of the Union; they are local, and relate to the municipal affairs of the Territory.” “Every State has the right of determining how far, in a spirit of comity, it will respect the laws of other States. Those laws have no intrinsic right to be enforced beyond the limits of

the State for which they were enacted. The respect allowed them will depend altogether on their conformity to the policy of our institutions. No State is bound to carry into effect enactments conceived in a spirit hostile to that which pervades her own laws." "It is a humiliating spectacle, to see the courts of a State confiscating the property of her own citizens by the command of foreign law. If Scott is freed, by what means will it be effected, but by the Constitution of the State of Illinois, or the Territorial laws of the United States? Now, what principle requires the interference of this court? Are not those governments capable of enforcing their own laws; and if they are not, are we concerned that such laws should be enforced, and that, too, at the cost of our own citizens? States, in which an absolute prohibition of slavery prevails, maintain that if a slave, with the consent of his master, touch their soil, he thereby becomes free. The prohibition in the act, commonly called the Missouri Compromise, is absolute." "Now, are we prepared to say that we shall suffer these laws to be enforced in our courts? On almost three sides the State of Missouri is surrounded by free soil. If one of our slaves touch that soil with his master's assent, he becomes entitled to his freedom. If a master sends his slave to hunt his horses or cattle beyond the boundary, shall he thereby be liberated? But our courts, it is said, will not go so far. If not go the entire length, why go at all? The obligation to enforce to the proper degree, is as obligatory as to enforce to any degree. Slavery is introduced by a continuance in the Territory for six hours as well as for twelve months, and so far as our laws are concerned, the offence is as great in the one case as in the other. Laws operate only within the territory of the State for which 59 they are made, and by enforcing them here, we, contrary to all principle, give them an extra-territorial effect."

"There is no ground to presume or to impute any volition to Dr. Emerson, that his slave should have his freedom. He was ordered by superior authority to the posts where his slave was detained in servitude, and in obedience to that authority, he repaired to them with his servant, as he very naturally supposed he had a right to do. To construe this into an assent to his slave's freedom would be doing violence to his acts. Nothing but a

persuasion, that it is a ditty to enforce the foreign law as though it was one of our own, could ever induce a court to put such a construction on his conduct."

"An attempt has been made to show that the comity extended to the laws of other States is a matter of discretion, to be determined by the courts of that State in which the laws are proposed to be enforced. If it is a matter of discretion, that discretion must be controlled by circumstances. Times now are not as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures whose inevitable consequence must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit. She is willing to assume her full responsibility for the existence of slavery within her limits, nor does she seek to share or divide it with others. Although we may, for our own sakes, regret that the avarice and hardheartedness of the progenitors of those who are now so sensitive on the subject ever introduced the institution among us, yet we will not go to them to learn law, morality, or religion, on the subject." 15 Missouri, 583–587.

Mr. Justice Gamble dissented for the following reasons: "In every slaveholding State in the Union, the subject of emancipation is regulated by statute, and the forms are prescribed in which it shall be effected. Whenever the forms, required by the laws of the State in which the master and slave are resident, are complied with, the emancipation is complete, and the slave is free. If the right of the person thus emancipated is subsequently drawn in question in another State, it will be ascertained and determined by the law of the State in which he and his former master resided; and when it appears that such law has been complied with, the right to freedom will be fully sustained in the courts of all the slaveholding States, although the act of emancipation may not be in the form required by the laws of the State in which the court is sitting.

”In all such cases, courts continually administer the law of the country where the right was acquired; and when that law becomes known to the court, it is just as much a matter of course to decide the rights of the parties according to its requirements, as it is to settle the title of real estate, situate in our State, according to our own laws.

“We, here, are the citizens of one nation, composed of many different States which are all equal, and are each and all entitled to manage their own domestic interests and institutions by their own municipal law, except so far as the Constitution of the United States interferes with that power. The perfect equality of the different States lies at the foundation of the Union. As the institution of slavery in the States is one over which the Constitution of the United States gives no power to the general government, it is left to he adopted or rejected by the several States, as they think best. Nor can any one State, nor any number of States, claim the right to interfere with any other State, upon the question of admitting or excluding this institution. It must be borne in mind, that this freedom 60 and equality of the different States supposes that each can, of its own will, according to its own judgment, exclude slavery, with as little cause of offence to any of the other States, as if its decision was in favor of admitting it. As citizens of a slaveholding State, we have no right to complain of our neighbors of Illinois, because they introduce into their State Constitution a prohibition of slavery; nor has any citizen of Missouri, who removes with his slave to Illinois. a right to complain that the fundamental law of the State to which he removes, and in which he makes his residence, dissolves the relation between him and his slave. It is as much his voluntary act, as if he had executed a deed of emancipation. Nor can any man pretend ignorance, that such is the design and effect of the constitutional provision. The decisions which have heretofore been made in this State, and in many other slaveholding States, give effect to this and other similar provisions, on the ground that the master, by making the free State the residence of his slave, has voluntarily subjected himself and property to a law, the operation of which he was bound to know. It would seem difficult to make any sound distinction beween the effect of an emancipation produced by the act of the master, in thus voluntarily placing his slave under the operation of such a law, and that

of an emancipation produced by the act of the master, by the execution of an instrument of writing in any State where the slave resided, which, according to the law of that State, would be sufficient to discharge the slave from servitude, although it might not be a valid emancipation under the laws of another State.

“While I merely glance at the reasons which might be urged in support of the present plaintiff's claim to freedom, if it were an original question, I do not propose to rest my dissent from the opinion given in this case, upon the original reasoning in support of the position. I regard the question as conclusively settled, by repeated adjudications of this court, and if I doubted or denied the propriety of those decisions, I would not feel myself any more at liberty to overturn them, than I would any other series of decisions, by which the law upon any other question was settled. There is, with me, nothing in the law relating to slavery, which distinguishes it from the law on any other subject, or allows any more accommodation to the temporary public excitements which are gathered around it.” “In the midst of all such excitement, it is proper that the judicial mind, calm and self-balanced, should adhere to principles established when there was no feeling to disturb the view of the legal questions upon which the rights of parties depend. In this State, it has been recognized, from the beginning of the government, as a correct position in law, that a master who takes his slave to reside in a State or Territory where slavery is prohibited, thereby emancipates his slave. *Winney* v. *Whitesides,* 1 Mo. Rep. 473; *LeGrange* v. *Chouteau,* 2 Mo. Rep. 20; *Milley* v. *Smith,* Ibid. 36; *Ralph* v. *Duncan.* 3 Mo. Rep. 194; *Julia* v. *McKinney,* Ibid. 270; *Natt* v. *Ruddle,* Ibid. 400; *Rachael* v. *Walker,* 4 Mo. Rep. 350; *Wilson* v. *Melvin,* Ibid. 592. These decisions, which come down to the year 1837, seem to have so fully settled the question, that since that time there has been no case bringing it before the court for any reconsideration until the present.” “The cases here referred to are cases decided when the public mind was tranquil, and when the tribunals maintained in their decisions the principles which had always received the approbation of an enlightened public opinion. Times may have changed, public opinion may have changed, but principles

have not and do not change; and, in my judgment, there can be no safe basis for judicial decisions, but in those principles, which are immutable." 15 Missouri, 588–592.

APPENDIX.

Since that part of the foregoing review which relates to the citizenship of free negroes was printed, our attention has been directed to the case of the seamen taken out of the American frigate Chesapeake, by the British ship of war Leopard in 1807, which was the beginning of the difficulty between the United States and Great Britain, that ultimately led to the war of 1812. The committee of the House of Representatives, to whom the subject was referred, reported to the house "that it has been incontestably proven, as the accompanying printed document No. 8 will show, that" three of the men taken (naming them) "are citizens of the United States." By the document referred to, it appears that two of these three men were colored, one of them the child of a female slave, and who had himself formerly been held as a slave. See Report of the Committee, pp. 31–36, 43, 44, 49. President Jefferson, in his proclamation interdicting our harbors and waters to British armed vessels, issued immediately after the outrage, said:—"That no circumstance might be wanting to mark its character, it had been previously ascertained that the seamen demanded were native citizens of the United States." p. 6. This proclamation was countersigned by Mr. Madison, then Secretary of State. Mr. Madison, in his letter to Mr. Monroe, then the minister of the United States at London, instructing him to demand reparation of the British government, dwells upon the fact that the men were citizens of the United States; and Mr. Monroe, in his formal demand upon the British government, said:—"I have the honor to transmit you documents which will, I presume, satisfy you that they were American citizens." Correspondence between Mr. Madison, Mr. Monroe, and Mr. Canning, on the subject of the attack on the Chesapeake, pp. 6, 10, 27. All the above references are to the public documents printed by order of the House of Representatives, 6 62 at the first session of the tenth congress. It thus appears, not only that three of the first five presidents of the United States, two of them men who had taken as great part as any in framing our national policy and system of government, spoke of colored men as

citizens of the United States; but that the government made the defence of their rights as citizens, a cause for putting the nation in a hostile attitude towards a foreign power.

We may also well allude in this connection to the proclamation issued by General Jackson, dated Mobile, September 21, 1814, addressed “to the free colored inhabitants of Louisiana,” in which he says: — “Through a mistaken policy you have heretofore been deprived of a participation in the glorious struggle for national rights in which our country is engaged. This no longer shall exist. As sons of freedom, you are now called upon to defend our most inestimable blessing. As Americans, your country looks with confidence to her adopted children for a valorous support, as a faithful return for the advantages enjoyed under her mild and equitable government. On enrolling yourselves in companies, the major-general commanding will select officers for your government, from your white *fellow citizens.* Your non-commissioned officers will be appointed from among yourselves.”